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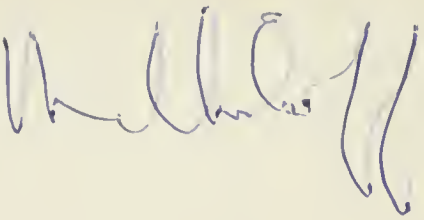

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AUGUST 1999

"CLEANSED OF WORDS WITHOUT REASON, MUCH OF THE LANGUAGE OF THE LAW NEED NOT BE PECULIAR AT ALL. AND BETTER FOR IT."

THE LANGUAGE OF THE LAW
BY DAVID MELLINKOFF

NARRATIONES MODERN

OR MODERN

REPORTS

Begun in the now

UPPER BENCH COURT

AT

VVESTMINSTER,

In the beginning of *Hillary* Term 21 *Caroli*, and continued to the end of *Michaelmas* Term 1655. as well on the Criminall, as on the Pleas side.

Most of which time the late Lord Chief Justice *Roll* gave the Rule there.

With necessary Tables for the ready finding out and making use of the matters contained in the whole Book.

And an Addition of the Number Rolls to most of the remarkable Cases.

By William Style *of the Inner Temple* Esquire.

Ut singulis prosim, opto, precor.

Nam Genus et proavos & quæ non fecimus ipsi,
Vix ea nostra voco. Ovid: Metamorph. lib. 13.

LONDON,
Printed by *F. L.* for *W. Lee, D. Pakeman, G. Bedel*, and *C. Adams*, and are to be sold at their shops in *Fleetstreet*. 1658.

To the Honourable

IOHN PARKER

One of the

BARONS

Of his Highneſs the

LORD PROTECTORS

COVRT

OF THE

Publique Exchequer.

SIR,

IN purſuance of what I not long ſince intimated in the cloſe of the Epiſtle Dedicatory prefixed to my Practical Regiſter; and in hopes of as favourable an acceptance of this tender of my reſpectfull ſervice, as you then pleaſed to afford my weak endeavours, am I now encouraged to make this my ſecond humble

hũmble adreſs. Though this be but a yonger brother, in reſpect of its time of production, yet in reference to its firſt conception, growth, & parts, I may juſtly ſay, it far excels the elder birth, and is much more fit to do your Honour, and the Publique, ſervice, and may be (I conceive) capable of as large, if not of a greater meaſure of your favour and protection. I will not be troubleſome to you in relating the pains & time I have taken and ſpent in this Collection and Publication, but ſhal leave it to your judicious conſideration. How great ſoever they have been I repent me not, but am (in my ſelf) abundantly ſatisfied, and do think it reward enough, that I have thereby gained this opportunity to ſhew my continuing humble reſpects to your Honour, and my willingneſs to be ſome way ſerviceable to others, whatever I have been to my ſelf (in that Vocation God hath of his goodneſs been pleaſed to place me in) and to give an Accompt to the World (a thing which I hold every good Chriſtian is bound to do) of the expence of my time.

It may be objected, that the Preſs hath been very fertile in thisour Age, and hath brought forth many, if not too many births of this nature. I muſt confeſs this Truth; but how legitimate moſt of them are, let the Learned judge: This I am ſure of, there is not

a father alive to own many of them, and they speak so plain in the Language of *Ashdod*, that a knowing-man cannot believe *Neh. 13. v. 23.* they ever sprung from *Israelitish*-Parents, but by their pronouncing of *Siboleth* insteed *Jud. 12. v. 5.* of *Shiboleth*, may easily collect of what extract they are. What I here present you with, is, (though a Homely, yet) a lawfull Issue, and I dare call it mine own, and that (I believe) I may do with as good a right as any ever might a work of the like nature, having had as little (if not less) assistance from others in the bringing it forth, as any that have travelled in this kind before me. I am not so blindly fond, or so opiniastre as to think it free from Errors and Mispritions, I fear there may too many be found in it, and no wonder, for *Humanum est errare, labi, decipi*; yet this I do knowingly aver, that I have not (herein) *ex proposito* or willingly injured any; but have been as studious and carefull in the penning of this my Collection to do right to every person concerned, and to make the Truth appear clearly in its native colours, as was possible at a throngued Bar to do. Nor have I been less wanting in my best endeavours, to prevent and correct the Errors of the Press, (though I must acknowledge my pains and care are not herein fully answered) that it might appear in publick

lick, though not in ſo rich a Dreſs as to be a Companion for the beſt, yet (at leaſt) be by your favour ſuffered to paſs (as tollerable) amidſt the crowd of a multitude of Editions, cloathed in as ill if not in a worſe and more unbeſeeming habit,

Inner-Temple, May the 17*th*. 1658.

Sir, I am yours moſt obliged, reſpectively to ſerve you

WILLIAM STYLE.

To

To the Industrious, and Ingenuous Professors, and Students of the Common Laws of England; *but more particularly, and affectionately to the Associates of the honourable Society of the* Inner Temple.

GENTLEMEN.

FOr a more noble Epithite I know not how to give you (the greatest & best of men on earth being in truth no more,) These ensuing Reports were at first briefly taken by me in the Law-french, without any thought of making other use of them, then for my ~~owne~~ privat satisfaction, And they did for some time after lye so confusedly scattered in my Note-books, that as they then lay, they were altogether useless to any but my self, and that not without much expence of time and great trouble, so that what of them my unhappy memory could not retain, (which was not much) was in a manner lost as wel to my self, as unto others; to remedy this inconvenience, (if I may so call it,) of the losse of my constant attendance, & pains for so many years together taken at the now upper Bench Bar, with very litle profit either to others or my self, than some small improvement of my knowledge in the practical part of the law, and in pursuance of that antient Moral Axiome, *Omne agens agit propter aliquem finem*, I was encouraged to continue my travail, and expence of time in the gathering together, transcribing, and putting of them into that order, and method you now behold them, yet as then not having any intent or desire to make them publique, but only more readily usefull to my self, and such of my Friends and Acquaintance as should at any time desire to be satisfied in any thing I was able to impart unto them. But this not answering the expectation, and importunities of some of my neer relations, and many of my intimate Friends and Acquaintance, nor knowing into whose hands my papers might fall, nor how my self and others be injured in the publishing of them after my decease, which I was uncertain when it might happen, and did believe it could not be many years off, by reason of my declining years; but more especially in respect of the weak and crasy constitution of my Body much macerated by sharp, and tedious sicknesses, and being willing to leave some testimony behind me, that I have not slighted, or wholy neglected my calling, but have ever had an honourable esteem of it, though I have hitherto reaped but little of that benefit, which too too many do so eagerly hunt after, but have been doing something therein, and have not lived altogether a drone for so many years together in so famous a Society amidst so many learned men, to the dishonour thereof, and to my one reproach; I did at last resolve (notwithstanding the unavoidable censures, which I was confident I should meet withal, what ever I have, or could say to avoid them,) to give way to this publicati-

on of them, even in this age, wherein most of the Cases, and matters herein reported are yet fresh (I suppose) in the memories of many, who may easily trace me where ever I step awry; But I hope to find them not only just in vindicating of me, in that which I have truely and faithfully reported, but also favourable in censuring, and passing by those slips and misprisions they may herein meet withall, caused either by the Printers negligence, or my own misapprehension of the sense of the matters, and things delivered and spoken unto, and the rather, in regard that I have endeavoured as neer as I could to render things in the same expressions they were first uttered, that so I might as much as might be, avoid the danger of injuring of any herein concerned, by putting another sense upon them, than what they intended; and this as it was the old way, so I conceive what ever may be objected to the contrary, that it is the best, and cleerest way of reporting. For those, that make it their businesse to censure, and not to read or understand books, I shall say nothing to them, but leave them to abound in their one sense if they have any, and to please themselves with their own phansies. I have made these Reports speak English, not that I believe they will be thereby generally more usefull, for I have been always, and yet am of opinion, that that part of the Common Law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others, than to defend themselves; but I have done it in obedinece to authority, and to stop the mouths of such of this English age, who though they be as confusedly different in their Minds and Iudgements, as the builders of *Babel* were in their languages, yet do think it vain, if not impious to speak or understand more than their own mother-tongue. Some may peradventure, Notwithstanding the reasons I have formerly offered for this my publication, be ready to object that it was vain, glory, and a too confident boldnesse, and high conceipt of mine own abilities that makes me thus appear in publique; but those that know me I believe are of another opinion, and dare clear me of this aspersion, and well they may, for the truth is I have alwayes been, and yet am so naturally distrustful of my own parts, that I fall far short of that necessary boldnesse which is requisite for every man to be armed withall in the excercising of publique employments, and what losse I have suffered by the want of this, I my self do best know, and is not unknown to many, some of whom have out of their well-wishes to me, and others to my disparagement (as they thought) been pleased to take notice of it. If any of the Cases and matters herein conteined seem common unto any, and are to insipid to please their curious Palates, let them passe them over: It may be they may prove usefull to others, and I doubt not but the most curious may find many things that may give them delight and satisfaction. And in the farther vindication of these Reports, I shall desire all to take notice, that first, these were most of them taken in unsetled times, wherein the Law was almost at a stand, and therefore

it

it cannot be reasonably expected they should be so quick and full of matter, as those that have been gathered when the Laws flowed in a more open, and uninterrupted Chanell, when the Courts of Iustice were full fraught with businesse, and were in a more splendent and flourishing condition than in these latter times; and next, that this work is not a collection only of some choice Cases taken by several hands in all the Courts of *Westminster*; but is only a continued narrative of the Cases, and proceedings of the new upper Bench Court for 10 years together, and taken by one only hand, without the help or assistance of any other, during which time I have omitted but little, saving when by reason of sickness, I was for a Term or two constrained to be absent. And the more to encourage all to the perusall of them, I dare affirm that there is much various matter contained in them, & different from what is to be found in other Reports taken in former years, occasioned by the many alteration of the face of things, and the changes of government happing at this time, and also by reason of my constant observing, inserting, and interweaving of all the remarkable passages transacted on the Criminal side, with those hapning on the Pleas side, which in other Reports hath very sparingly at any time; if at all been performed. I have also for the Readers greater ease and benefit, added hereunto three Alphabetical Tables, the first containing the names of the several Cases; a second containing the several general Heads, or Titles under which the several matters dispersed through the whole book, are properly digested; and the third, and last, being a large Table particularly directing to the Page and Case, wherein you may find the subject matter methodically ranged under those Heads or Titles. And for your further and fuller satisfaction, and making the Cases the cleerer proof, and more authentical authority to be cited and given credit unto, you have the number Rolles prefixed to most of those that are remarkable amongst them. I might, and would if I had thought it necessary have much enlarged these Reports, and made the volume swell to a far greater bulk: But my aim and endeavours have generally been to take the chief points only, and substance of the matters arising and spoken unto, and the rational parts of the arguments and authorities used and urged, to inforce and prove what was surmised to be Law on either side, and the grounds and authorities upon which the opinions and resolutions of the Court are framed and given, and to passe by all the luxuriant flourishes of wit, and the multiplying of Similary Cases to the Cases in question, as serving more for the most part to prove the curious phansy, & much readiug of the Arguer, than the proof of the points of the cases in question, or the satisfaction, or information of the Auditors or Readers Iudgment; and I have ever (yet with submission to better Iudgements,) conceived this concise way of taking Reports to be farr more beneficial and delightful, not only to the Reporter, but also to those that shall read them

them, then that long and tedious way, wherein the truth is so overshadowed with multiplicity of words, that it is very difficult through those Clowds to discover, and behold her perfect beauty so well, as when she appears bare-faced in her true and natural complexion. I need not say any thing in commendation of the Common Laws, they do so sufficiently, and clearly speak their own worth, not only in our own land, but even through the Christian, if I may not say the whole known world. The fruit that every one from him that sits on the Throne, to her that grindeth at the Mill, throughout this nation in the tender preservation of our Religion, Lives, Liberties, and Properties do lowdly proclaim their excellency, and do justly claim our reverent esteem of them, and their sweet influence which our Neighbour Nations do partake of from their light and heat, hath purchased an honourable name, and repute amongst them. Though no doubt but other Kingdomes, and Republiques have many excellent written and established Laws suitable to the particular constitutions of the people, and to their several frames of government, and amongst the rest the Civil or imperial Laws, yet they all want many remarkable excellencies that are in the Common Laws of *England*, and the proceedings therein, and amongst the rest to instance in no more, they are very deficient in this way used in our Law for many ages past, of reporting, and leaving to posterity the learned arguments of councel at the Bar, and of the grave and profound resolutions of the reverend Iudges in the decision of Cases arising, and controverted amongst us; and this way how lightly soever it be now esteemed of by many amongst us, yet is by Strangers much valued, and was heretofore so much set by amongst us, and thought so highly advantageous to the publique, that the wisdome of this State did then think fit to appoint grave and judicious men, encouraged by an annual stipend, to attend and perform this task, and therefore I hope that he who hath undertaken this hard labour freely and voluntarily in relation to the publique good, without hope of reward, is so far from deserving blame and reproof, that he is rather to be cherished and countenanced in these his endeavours by those in authority, and not to be rashly and uncharitably calumnicated, or censured by any, but to be favourably interpreted, and received as one that makes it his aim to be accompted a true lover of the Common Laws, and really honoureth the profession, and Professors thereof.

Inner Temple, May
the 19th. 1658.

William Style.

An Alphabetical

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HILARY TERM

21 Car. Banc. Reg.

A Prohibition was prayed to the Admiralty, to stop proceedings there, upon a Contract betwéen the parties suggested to be made upon the land within the body of a County, and not upon the high Sea; And the surmise was penned thus. If there was any Contract made betwéen the parties (as the libel supposeth) it was made upon the land within the body of a County; and not upon the high Sea. The Court held this suggestion ill; for the uncertainty of it, and ordered that it should be amended and made absolute, viz. That the Contract was made upon the land, &c. And that the words, if there was any Contract made; should be put out, because they made it uncertain whether there was any Contract or no, and so by consequence did destroy the very ground of the surmise. Prohibition. Suggestion.

Barnaby against Goodale,

21 Car. Banc. reg.

Trin. 21 Car. rot. 201.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case in the Court at Owse bridge in York, and the first Error assigned was in the Process, because it was by summons; whereas the action being an action upon the Case, which is in the nature of a Trespass; the Process should be by Attachment, and Distress infinite, and not by summons. But to this it was answered by Roll Justice, that since 10 Iacobi this manner of proceeding is no Error, and that that Court hath no power to award a Capias in an action upon the case by the Statute of 14 H. 7. two other light exceptions were taken to the venire, but not insisted upon. But the main exception was to the Judgement, which was entred thus, Ideo consideratum est per curiam dicti Domini Regis, whereas (as it was objected) it ought to have been, ideo consideratum est per eandem Curiam, Error upon a Judgement in an action upon the Case. Error. Capias.

Curiam, or per Curiam prædictam. And at the first the Court seemed to incline, that this was a material exception, for these reasons, viz. because inferior Courts ought not to shew things only by implication; but they ought to shew them expressly, and because surplusages in such Courts are ill: And lastly because inferiour Courts ought to keep themselves strictly to their antient forms, and not to varp from them; yet afterward judgement was affirmed except better matter should be shewn, nota.

Inferiour Courts.

Masterman.

21 Car. Banc. Reg.

Error upon a judgement in an action of Debt upon an Obligation.

An action of Debt was brought in an inferiour Court, upon an Obligation, with a Condition, for the payment of a certain sum of money at a certain time therein expressed; but no place was limited in the condition for the payment thereof. Judgement was given for the Plaintiff: The Defendant brings a writ of Error in this Court to reverse this Judgement, and assigns for Error; That because there appears no place of payment for the money in the Condition of the Bond; so that by that it cannot appear whether the cause of action lieth within the jurisdiction of the Court, where the action was brought or not; therefore it should have been made appear by some part of the Record, that the money was to be paid within the Jurisdiction of the Court, which is not here done, and therefore the Judgement erronious: The Court held this for error, and ordered that the Judgement should be reversed, if cause were not shewn to the contrary before the end of the term.

Error.

Knights Case.

21 Car. Banc. Reg.

Error upon a Judgement given in an action of Debt for rent.

A Lease for years was made of certain houses in York, reserving a yearly rent payable in London, and for the rent behind an action of Debt was brought in the City of York, and judgement thereupon given for the Plaintif: The Defendant brings a writ of Error to reverse this judgement, and assigns two Errors. 1. That the issue upon which the judgement was given was not tryable within the jurisdiction of the Court, where the judgement was given; for the issue was upon the payment of rent, which was payable at London, and not at York, and so payment or not payment ought to be tryed at London and not at York. The second exception was to the Venire, which was de vicineto Civitatis generally, and names not any Parish in particular whence the jury should come: And to prove this to be a good exception, the Book of 5 H. 5. was urged; but the Court denyed that Book to be Law, and cited Gavel and Gippoes case, 10 Jac. adjudged to the contrary; that de vicineto Civitatis generally, without naming a Parish in the City, is good: But upon the first exception the Court advised.

Venne.

Watson

VVatson against Norbury

21 Car. Banc. reg. Mich.

20 Car. rot. 156.

VVAtson brought an Action upon the case against Norbury, for procuring a Commission of Bankrupt against him, by virtue whereof he broke open his Shop, and took away his goods and Shop-books, whereby he was so discredited that he lost his trade, to his damage, &c. To this the Defendant pleads, that the Plaintiff did heretofore bring his Action of trespass for the breaking open of his Shop, and for the taking away of his goods, and had in that Action recovered damages against him, and demands if he shall not be thereby barred in this Action; And that he should be barred the Defendants Councell alleged, that a recovery in one personal Action is a bar in all personal Actions touching the same thing, and that here the Action of trespass formerly brought, and the Action of the case now brought were personal Actions, and that they were both brought for the same thing, and therefore the Plaintiff ought to be barred; It was also urged that an Action of the case lies not in this case, for that, to ground an Action upon the case, there must appear to be malice in the party that did the fact, and prejudice to the party to whom the fact is done, but there appears no malice here, for what was done is said to be done, by virtue of a Commission of Bankrupt which shall be intended a lawfull authority to warrant the fact, and not grounded upon malice, so that malice and prejudice do not both appear, but only damage, and that alone will not support this Action, for neither for damage alone without malice, nor for malice without damage will an Action upon the case lie. But to this it was answered (to which the Court enclined) That this Action upon the case was not brought for the same cause that the Action of trespass was formerly brought, for that was only for the breaking open of the Shop, and taking away his goods, and the damages he received thereby, but this Action is brought for the damage he sustained, by the losse of his credit, and hindrance in his trade thereby, caused by the Defendants taking out a Commission of Bankrupt against him, and by colour thereof breaking open his Shop and taking away his goods, and so disparaging him in his reputation, whereby he lost his trade; and though the breaking open of his Shop, and the taking away his goods be named in this Action, as it was in the former Action of trespass, yet it is but by way of Inducement to this Action upon his case, and not to recover damages for that wrong, and here being two severall wrongs done to the Plaintiff which do not one depend upon another, the Plaintiff must bring two severall Actions for them, and not joyn them in one Action, because the damages must be severall which are to be recovered, but if they had depended one upon another he might have joyned them in one Action, and recovered joynt dammages for both: and besides these two Actions differ in their nature one from the other, and the judgements given in them are severall, for the Judgement in an Action of Trespass vi et Armis, as the first Action was, is Capiatur, because there is thereupon a fine due to the King, but the Judgement in an Action upon the case is ideo in misericordia, and so though

Action upon the case.

Inducement.

Actions severall.

Joynt Actions.

Joynt damages.

though the Plaintiff have Judgement here in his Action upon the case, it cannot be said he hath had Judgement already; for that must be intended, at least a Judgement of the same nature, which cannot be in this case. And to that which is objected, that if the Plaintiff should recover damages in this Action, he should recover damages twice for one and the same thing which is against Law; it is answered, that it is not for the same thing but clearly for another, and if he should not have this Action he were without remedy for the damage he suffred in the losse of his Credit, and the damage in his Trade; for in the former Action he recovered no damages for that, for the Jury never took that into their consideration, for they had no power to take any damages into their consideration which happened after the Trespass done, for which the Action was brought, but only for the breaking open of the Shop, and the taking away of his Goods; and although he might at the first have brought his Action upon the case as he hath now done, yet he was not compellable thereto, but had his Election to bring either an Action upon his case, or an Action of Trespass as should most make for his advantage, for this Election of Action belongs to every subject as his birth-right, and he is not to be hindred from it. Adjournatur.

Election of Actions

Remington and Kingerby.

Mich. 18 Car. rot. 72.

Error upon a Judgement in an Annuity in the Common plea.

REmington grants a rent out of certain Lands to Fawne with a clause of distress, and a nomine pœnæ in the deed for the non payment thereof, according to the time limited, the rent is behind after the time limited by the nomine pœnæ. Fawne brings a writ of Annuity in the Common Pleas for the Arrerages of the Annuity, and for the moneys due upon the nomine pœnæ, and hath Judgement. Remington brings his writ of Error in this Court to reverse this Judgement, and Assignes for Error, that the writ of Annuity did not lie for the nomine pœnæ, though it did for the rent, for though it was in the Power, and Election of Fawne to charge either the land out of which the rent was to issue with the rent behind by distress, and so to make it a rent charge, or else to bring his writ of Annuity for it against Remington, and so to charge his person; yet he had no such Power for the nomine pœnæ, because it was in the nature of a rent, and was necessarily to issue out of the Land, and not to be charged upon the Person; and it was further alleged that a nomine pœnæ was an uncertain thing and comes not within the Statute of 21 H.8. touching Advowzes as a rent charge doth which is certain. Another exception was, that it appears not in the Record, that Fawne did make a good demand of this nomine pœnæ upon the Land out of which the rent was issuing, as he ought to have done before he could bring an Action for it, for though there do appear to be a demand, yet if it appear not to be a legal demand it is Null, and the party shall take no benefit by it. Adjourned.

Nomine pœnæ.

Nuls

Nuls and Cheney

21 Car. B. R.

AN Action of the case was brought for these words, I do accuse you to be a Witch, and require you to be searched, and a verdict was given for the Plaintiff; the Defendant moves in Arrest of Judgement that the words are not actionable, because it is not averred that the party accused had done any hurt to Cattell or otherwise, or hath had any Communication with the Devill. And so the Court held, because the words spoken did not bring the Party of whom they were spoken within the Statute of 1 o Jac. concerning Witch-Craft. Arrest of Judgement in an Action upon the case.

Wingfield and Sherwood.

WIngfield brings an Action of Covenant against Sherwood his Lessee for years, and declares that he had Covenanted by Indenture that hee would not cut down more tymber growing upon the lands demised than sufficient for needful and necessary reparations of the houses and buildings let unto him; and for breach Assigns, that he had cut down tymber to the value of ten pounds, and had converted them to his proper use; and upon this hath a Verdict and a Judgement against him: Sherwood brings a writ of Error in this Court to reverse this Judgment, and Assigns for Error, that there was variance between the Covenant expressed in the lease, and the Covenant set forth in the declaration whereupon the breach was assigned, and so the Judgment was not given upon a breach of the Covenant expressed in the lease, viz. That he should not cut down more tymber than was necessary for reparations; for by this breach the Plaintiff supposeth that the Defendant had Covenanted not to cut down tymber to employ to his own use, which is not the Covenant expressed in the lease, but another: And though the Defendant had cut down tymber, and converted it to his own use, this was not a breach of the Covenant expressed in the Indenture, except it be averred that he cut down more than was necessary for reparations, and converted it to his own use; and for this Error the Judgement was reversed. Error upon a Judgement in an Action of Covenant. Covenant.

Whitwell and Short.

Trin. 21. Carl. rot. 227.

WHitwell brought an Action of Trespass for assaulting, beating, and wounding him, against four several persons: three of them plead not guilty, and are found guilty; and the fourth pleads not guilty to part, and justifies for the rest, viz. The wounding, and is found guilty as to the wounding only, yet the verdict was found generally for the Plaintiff, and intire damages assessed and Judgement given, and Arrest of Judgement in an Action of Trespasse.

a writ of Error was brought, and the Error assigned was that the damages ought not to be entire against all, because that the fourth person was only found guilty of part of the trespass, to wit, the wounding, and therefore as to him the damages ought to have been severed, in relation only to the wounding, and not as it is, for so damages should be given twice for the same thing. First against the three, and then against the fourth, which the Court granted, and reversed the Judgement.

Several damages.

VVard and Coggin.

Pasc. 22 Car. rot. 257.

Error upon an action of Debt.

VVArd brings an Action of debt in the Common pleas against Coggin, and declares that the Defendant in consideration that he the Plaintiff, at the request of the Defendant, had sold certain wares to J. S. did assume and promise to him the Plantiff, that he would pay such a sum of money for them; and for non payment accordingly he brings his Action, and hath a Verdict and Judgement. The Defendant brings his writ of Error in this Court to reverse this Judgement, and Assigns for Error, That an Action of debt lyes not in this case, because the debt which the Defendant promised to pay, and for which the Action is brought, was raised, and became a duty before the promise made for the payment of it, and so an Action of debt cannot be grounded for it on the promise. And the words in the declaration do sound meerly upon a promise, upon which a good consideration for an Action of the case may be grounded; but not to bring an Action of debt.

Case.

Hogg and Vaughan.

Arrest of Judgement in an action upon the Case.

HOgg brings an Action of the Case against Vaughan for these words spoken of him, viz. Thou art a perjured Priest, and hath a verdict. It was moved in Arrest of Judgement, that the words were not actionable, for they signified no more than that he was forsworn; But the Court held that they must be meant, that he was guilty of perjury, for which he might be endicted, and therefore were actionable.

Mich. 21 Car.

Action upon the case upon a promise.

I. Assumes and promiseth to B. that if B. will pay 50 l. to C. his son, who was maried to D. the Daughter of I. at such a time, that he will pay 100 l. to D. his Daughter at such a time; B. pays the 50 l. to C. at the time appointed, I. failes in payment of the 100 l. according as was agreed; B. dies intestate, and E. administers, and brings an Action upon the Case against I. upon this promise made to B. the Testator; and adjudged that the Action did well lie by the Administrator, though he should receive no benefit if he did recover.

Dickenson

Dickenſon and Preſton.

Mich. 22 Car. Banc. reg.

Ter. Paſc. 22 Car. rot. 251.

A Writ of Error was brought by Preſton, to reverſe a Judgement againſt him at York, and aſsigns for Error, that the Venire was de Balliva ſua, whereas it ought to have been de corpore Comitatus, and it cannot appear by the Venire to what place the Balywick extends; and the Balywick of the City may extend further than the City, and upon this the Court adjudged the Venire naught. Error to reverſe a Judgement in York. Venire

More againſt Savage.

22 Car. Banc. reg.

More Widow brings an appeal againſt Savage for the death of her Husband; Savage appears and demurs to the original writ, and ſhews for cauſe, that in one part of the writ, inſtead of the word tunc it was tuc, which made the Writ incertain. To this the Council of the other part anſwered, That it ought to be amended by the Statute of 14 E. 3. and that the Writ ought not for ſo ſmall a fault to be abated; But to this it was replyed, that the Statute was only for the amendment of mean proceſs, and not of original Writs; for original writs were not amendable, becauſe the party might purchaſe a new writ if a former were naught. In juſtification of the writ it was further urged, that the word tunc in the writ was a meer formal word, and not of the ſubſtance of the writ: and that the writ would be good enough without it; and therefore though it were miſtaken, it was not ſo material, as that the writ ſhould be thereby abated: But the Court anſwered, that an original writ, if it be defective in form, is abatable, if it be not amendable by Statute, and conceived, that here it being in an appeal, where life is in queſtion, the writ is not amendable, though it be defective but in form, neither by the Common Law nor by any Statute Law, nor can the party purchaſe a new writ, adjournatur; but afterwards, viz. 9. Feb. 22 Car. the writ was quaſhed for the cauſe aforeſaid, and becauſe it did not appear that the feme who brought the appeal was wife to the party ſlain at the time when he was ſlain. It was thereupon moved that the Defendant might be arraigned upon the Count, though the writ was abated; but the Court held he could not, becauſe the Count was founded on the writ which was abated, and theſe books were cited, 4 H. 6. 14. and 18 E. 3. 35. upon view of preſidents he was afterwards diſcharged. Demurrer upon an appeal

Luskins and Carver.

22 Car. Banc. reg.

The Caſe was this, Anne Carver made her laſt will and teſtament, and makes Luskins her Executor, having bona notabilia in divers Dioceſſes: Luskins proves the will in an inferiour Dioceſs, and not in the Prerogative Prohibition to the Prærogative Court, and a Mandamus.

rogative Court, as he ought to have done, a stranger sues for Letters of Administration in the Prerogative Court, Luskin desires to prove the will there, and that he may administer, the Court refuseth to admit him to administer the goods, except he will put in security to the Court to pay all the Legacies; but if he shall refuse, will grant Letters of administration to the stranger. Luskins moves in this Court for a writ of a Mandamus, to compell the Prerogative Court to grant him the administration, according to the will. The Court ruled the other party to shew cause the next day why they should not grant such a writ; and were of clear opinion they might do it, and to prove it, the Countesse of Barkshires case, Hill. 20 Iac. and the case of St. Burien in Cornwall was cited, and the same Term the writ was granted accordingly.

Mandamus

Forteſcue and Brograve.

22 Car. Banc. Reg.

An action upon a breach of Covenant by deed.

Plea

Concord.

The Plaintiff brings an action for breach of Covenant upon a Deed, The Defendant pleads a parol agreement afterwards, in discharge of the former Covenant; but the Court held the plea not good, and took these differences, That a parol agreement before a breach of it, may be discharged by parol, and so pleaded; after a breach it cannot be pleaded in discharge without satisfaction also pleaded; but a discharge may be pleaded by Deed be the Covenant by Parol or by Deed after a breach, and without satisfaction.

Broome and Evering.

Hill. 22 Car. Banc. Reg.

Hill. 21 Car. rot. 354.

Error to reverse a judgement given in a Scire facias to revive a judgement in debt.

A Judgement was given against the Testator of the Defendant, in an action of Debt for rent, and this judgement was revived by a scire facias against the Executor, and a verdict thereupon, and a judgement was given against him in the Common pleas; upon this a writ of Error was brought in the Kings Bench to reverse this judgement, and the error assigned was, that the tryal was insufficient, because the Venire facias was not good, and is not helped by the Statute of Jeofails, and to prove this, Baynams case in the 5th. Report was cited. But Hales answered, that the Venire facias being awarded before it ought, was to be accompted as if no Venire had been awarded, and said it was like to a dedimus to take a fine before the writ of Covenant issued forth to levy the fine, and so concluded, that it was helped by the Statute of Jeofails. But the Court took a difference, where in truth there was no Venire facias at all, and where there is an ill Venire facis as it is here, for though it be as bad as may be, yet being it is a Venire facias, it is not helped by the Statute of Jeofails; but if there had been none, the Statute had made the tryal good without it; and thereupon day was given to shew cause why the Judgement should not be affirmed. Pasch. 23 Car. the Judgement was affirmed.

☞ Error Jeofails

Andrews

Andrews Case.

Hill. 22 Car. Banc. Reg.

A Recognizance was acknowledged at Serjeants Inne in Fleetstreet, and delivered and enrolled at Westminster. The Court held that it was at the election of the Recognisee to bring his Scire facias either in London, where the Recognizance was acknowledged, or in Midlesex, where it was delivered and enrolled: But adjourned. Afterwards, viz. Pasc. 23 Car. the Court held that the Scire facias ought to be where the recognizance is taken, and not where it is recorded; for there it begins to be a Record; but this being in the Common Pleas, it was good both ways, and thereupon the party had his judgement. Where a Scire facias upon a recognisance shall be brought.

Rooke and Knight.

23 Car. Mich.

Mich. 22 Car. rot. 381.

A Judgement given in the Court at Dym Church, a limb of one of the Cinque Ports was removed by a certiorari into the Kings Bench; and thereupon issued a Scire facias for the Defendant, to shew cause why the Plaintiff should not have execution upon the judgement; to this the Defendant appears and demurs, and takes these exceptions, 1. That it is not expressed where Dim Church is. 2ly. In the return of the alias certiorari, it is said, sicut prius; and not sicut alias. 3ly. the Sheriff in the return is not named Knight and Baronet; neither doth he name himself by his name of Baptism and Surname: But the Court did over-rule all these exceptions, and gave judgement for the Plaintif. Demurrer to a Scire facias upon a judgement removed out of the Cinque Ports by Certiorari in the Kings Bench.

An action of the Case was brought for these words, Thou hast stoll'n my wood, and the Court inclined the words were actionable, but not if he had said, thou hast stoll'n my Trees, and it was said that a precipe will lie of a wood; for it shall be intended of woody ground; adjourned. Action upon the Case for words. Præcipe

Helliar and Grace his VVife.

Pasch. 23 Car. Banc. Reg.

An action upon the Case was brought by Helliar and his wife, upon a promise made unto them, during the Coverture; and it was moved, (a verdict being given for the Plaintifs) in arrest of judgment, that the Action ought to have been brought in the name of the Husband only, and not by the husband and wife; and a case to prove it was cited out of Dyer, and upon this exception the judgement was arrested till the other should shew cause to the contrary; And in this case it was said by the Court, that if an Obligation be made to baron and feme; that it is the better opinion, that the baron may bring an action upon this obligation in his own name only, and not name his wife, or else he may at his election bring the action in the name of himself and his wife joyntly. Action upon the Case upon an Assumpsit. Dyer 91. Joynt action

Betsworth and Betsworth.

Pasch. 8 Maii 23 Car. Banc. Reg.

Prohibition to the Prærogative Court

Jurisdiction, Ordinary

Prohibition

Incidents

Tryal

Prohibition Evidence

Prohibition

IT was moved for a Prohibition to the Prerogative Court upon a surmise that the party did endeavour to bastardise one that was legitimate. But the other party answered, that the surmise was not true, and urged, that the sute in the Prærogative Court was only, whether Letters of administration were by them well granted, or no, and not concerning Bastardy as the surmise sets forth, and therefore desires the Prohibition may not be granted; and for confirmation thereof the case was put, which was this: Betsworth had a wife called Bridget, who died; after he takes another wife called also Bridget, and dies intestate; Bridget the second wife takes Letters of administration of the goods and chatels of her husband deceased; the son of Betsworth sues in the Prærogative Court to repeal these Letters of Administration, upon pretence that Bridget the first wife of Betsworth was yet living. In this case the Court delivered these positions following. 1. That one ought not to sue in the Ecclesiastical Court, to Bastard an issue, but at the Common Law. 2. Where the Ordinary hath granted Letters of Administration to one that ought to have them, they ought not to be repealed by them. 3. Where a sute is in the Ecclesiastical Court for lands and goods, a Prohibition may be granted as to the lands; and they may proceed there notwithstanding, as to the goods. 4. That in this Case at the Bar, neither Bastardy of the issue, nor mariage is in question, as is surmised, but only the validity of the Letters of Administration, and that the other things are but as incident to the matter in question. 5. That wife or not wife is triable at the Common Law; but whether lawfully maried or not, is tryable in the Spiritual Court. 6. Where a thing is tryable in the Spiritual Court, and there is also a matter incident to it, which is tryable at the Common Law, there a Prohibition shall not be granted. 7. That a thing concluded in the Ecclesiastical Court touching lands, cannot be given in evidence in a tryal at Law for Land. 8. If the Common Law differ from the Civil Law, touching the legality or non legality of a thing, if they will proceed according to their Law, a Prohibition lies, because the Common Law is to be preferred. The rule of Court was, That a Prohibition should be granted, and that the other should demur upon it; and so it might be debated whether a Prohibition would lie or not, and to stay in the Spiritual Court in the mean time.

Pasch. 23 Car. Banc. Reg.

Arrest of judgement in an action upon the case.

ONe brought an Action upon the Case against I. S. for preferring a bill of Endictment against him, for stealing of a Mare, and that the grand Jury found an ignoramus, whereby he was discharged; the Plaintiff obtains a Verdict against the Defendant. The Defendant takes these exceptions to the declaration in Arrest of Judgement, 1. That it doth not appear thereby, that the Party who preferred the bill of Endictment gave any evidence to the grand Jury touching the bill. 2ly. It appears not that the Plaintiff was bound over to answer the Felony, and consequently was not molested by it, and so he can have no Action: But the Court stayed

stayed the Judgement to another day upon the exceptions taken, and Case.
sayed that an Action upon the Case lies for procuring one to be Endicted, Endictment.
although the party himself do it not, and that one may exhibit a bill of Endictment to a grand Jury without Oath, and they may notwithstanding grand Jury
find the bill, and although it be exhibited upon Oath, they are not bound to find it, if they see cause to the contrary, and that in the case at the barr the Action might be as well grounded upon the scandal, which grew to the party who was Endicted, as upon the trouble which might have befallen him by reason of the preferring the bill against him.

Hellena,

Pasc. 23 Car. B. r.

AN Action upon the Case was brought for these words, Hellena is a great Witch, and a Verdict found for the Plaintiff; It was moved to stay Judgement, because the words were not Actionable, for they did not shew that the Plaintiff had bewitched any thing, or done any thing that brought her within the compass of the Statute 1. Jac. against Witch-Craft: Judgement was hereupon stayed. Arrest of Judgement in an Action upon the Case.

VVilliamson against Henley.

Pasc. 23 Car. Banc. Reg.

Trin. 21 Car. rot. 362.

AN Action of Debt was brought upon an obligation, the condition was, that if the Defendant did sell the tithes in Ransom more that he should pay the Plaintiff such a sum of money, but if he sold them not, that then he should deliver an obligation to the Plaintiff, for the payment of a certain sum of money therein expressed at a certain day therein limited, and for non performance of the condition is the Action brought. The Plaintiff obtains a Verdict; the Defendant moves in Arrest of Judgement, that he ought to have convenient time for doing of the things expressed in the condition, and that it appears not by the Record that he had convenient time, and so there is no breach of the condition. But the Court held, that the time between the date of the obligation, and the bringing of the Action was a convenient time, and that there being a second thing to be performed in case the former were not done, that therefore that former thing ought to be done in some reasonable time, else the party would be too much prejudiced by staying to have the second thing performed, and therefore ruled that Judgement should be entred without better matter should be shewed. Arrest of Judgement in Debt upon an obligation. Time.

Savages Case,

Pasc. 23 Car. B. R.

Error upon a Judgement upon an Endictment.

SAvage was Endicted for forging, and publishing of Letters of credence to gather money, and was convicted, and Judgement given against him upon his own confession, and 100 l. fine set upon him, et quod capiatur. Exceptions were taken to this Judgement. 1. That it did not appear wher he received any money by virtue of these counterfeit Letters, nor at what time: But the Court answered, that the substance of the ofEndictment. fence for which he was Endicted was, the forging and publishing of the Letters, and not the collecting of the money; for though he had not collected a penny, yet the Endictment was good. A second exception was, that the Endictment did not say quod Counterfecit falso: But the Court held that the word Counterfecit necessarily implyed in it the word falso, and so not material whether falso were expressed or omitted. 3ly. It was objected, that the party was committed before he was convicted; But to Conviction. this the Court answered, that he was committed upon his own confession, which is a conviction in Law, and the Judgement was held good, and affirmed.

Needler and Guest.

Pasc. 23 Car. Banc. Reg.
Entred Trin. 1649. rot.

Arrest of Iudgement in a breach of Covenant.

NEedler brings an Action of Covenant against Guest, upon Articles, amongst which one was to allow such a sum of money to an under-Clerk, in the fir Clerks Office by the sheet, for every quire of paper he should write in copying and engrossing of bills, answers, &c. as was expressed in the said Articles: and upon this Needler obtains a verdict against Guest. In Arrest of Judgement divers exceptions were taken and over-ruled, but one was insisted upon, which was this, that there was more found in the breach of the Covenant assigned than was contained in the Covenant it self, for it was found, that he had not payed for 72 sheets which was 5 quire and a half, and so damages were given for more than ought Breach. to be, for the Covenant was to pay so much the quire and mentions not Damages. any half, and for this the Judgement was staied: for the Court said Supp'y. that the Law would not supply a casus omissus to bring it within the Covenant to ground a breach thereupon, what ever the intent of the partyes was that were parties to the Articles.

VVhitley and Fawsett.

Pasc. 23 Car. Banc. reg.

Action of Trover for distraining & sell ng his Cattel.

VVHitley brings an Action of Trover, and Conversion against Fawsett, for taking his Cattel by way of distress, and selling them by virtue of a warrant of Commissioners of Sewers for not paying

ing of a tax set by them towards the reparation of Sea walls: the Defendant pleads all the speciall matter, by way of justification, the Plaintiff demurrs to this Plea, and upon the demurrer takes these exceptions to it. 1. To the setting forth of the Commission, in that he shews not that three of the Commissioners were of the quorum. The 2d exception was, that in his Plea he had not set forth the Authority of the Commissioners; To that the Court answered it was not necessary. 3ly. That the Plea was but argumentative, which makes it naught. 4ly. It appears that there are 800. Acres of Land which are in the hands of the King, which are not taxed as by law they ought: and so the tax is unjust, because by the not taxing of them, a greater burden was laid upon the rest of the Land, than of right ought to be; and this the Court held a good exception, and said that the Kings Lands are taxable by the Statute. 5ly. The Statute is not pleaded as it ought to be. 6ly It doth not expresse, that Whitley in whose occupation the Lands are that are taxed, is the Assignee to Lynsee the owner of the Lands, but he may be a meer stranger, and so not taxable, nor his beasts to be sold. 7ly. It is not set forth, that he shewed his warrant, before he distrained, as he ought to do: In this case the Court first said that one may distrain, and sell the Cattel of the owner of the Land taxed, or his Assignee, for non payment thereof, but doubted whether a strangers Cattel might be distrained and sold: Roll Justice took these Exceptions to the Plea. 1. That the Plea did not set forth the limits of the Commission as it ought to do, and was therefore ill. 2ly. He said the Plea ought to have shewed, that three of the Commissioners were of the quorum. 3ly. That it did not appear by the Plea that the Lands taxed, where the distresse was made, are within the Level, to be taxed by the Commissioners. 4ly. The Tax is of the Land of such an one, and his Assignes, and this is too generally expressed, and cannot be levyed equally by such a tax. 5ly. The Plea sets not forth, that there was any notice given to Whitley of the tax made before the distresse taken, as there ought to have been, and for these reasons, he concluded that the Plea was not good. Bacon Justice held, first, that the Party had waived his benefit of the Plea given him by the Statute, by pleading specially, and he ought to make good his Plea, as he hath pleaded it, at his own perill: He held likewise, that there ought to be notice given of the tax, and a demand of it, before any distresse might be taken, and that the Plea was defective in this. 3ly. That he cannot sell a strangers goods for the tax as Whitley is, for ought that appears in the Plea. 4ly. By the Plea it appears, that he hath distrayned one Acre of Land for all the tax, which ought not to be, and upon these exceptions the rule was for the Defendant to shew cause before the end of the Term, why the Plaintiff should not have Judgement.

Tax.

Distresse.

Sale.

Plea.

Waiver.

Notice.

Demand.

Sr Maurice Abbot.

Pasc. 23 Car. Banc. reg.

Sir Maurice Abbot had a Judgement against one and dies, and three years after Execution is taken out in his name, upon the Judgement, the Court was moved to vacate this Judgement. but would not, for they said that there was no help in this case, but by bringing a writ of Error, except there can be any fraud proved in the proceedings

Motion to Vacate a Judgement.

Error.

Fraud. dings, and then the Court will take order to help the Party grieved: And thereupon ruled to examine the Attorney, and the Partyes whether there was due proceedings or no.

Vill de Charleton in Kent.

Pasc. 23 Car. Banc. reg.

Motion to quash a presentment and take off Amercements. A man was killed at Charleton in Kent, upon which the Coroner takes an inquest, and returns it into the Crown Office: upon this a presentment was drawn up in the Crown Office against the Vill. of Charleton, and found, and thereupon issues went out against the Vill: It was moved for the Vill to have them discharged, by reason that the presentment was not good, for it was grounded upon the Statute of 3 H. 7. chap. and sets forth that such a person was killed at Charleton, and that the murderer fled away in the night, by which it appears that the Vill. is not lyable to be amerced within the Statute: for the murtherer ought to escape in the day by the Statute, and not in the night, and for this it was quashed, and the Amercements discharged.

Amercements

23 Car. Banc. reg.

For quashing an order of the Sessions of Peace, for keeping a Bastard. The Court was moved to quash an order of sessions, made for the keeping of a Bastard Child, and these exceptions were taken to the order: First the order was, that the Party should pay a weekly sum for the keeping of the Child, whereas no such order could be made without the Parties consent, for by the Statute he is only compellable to secure the Parish, where the Child was born, that it should not be any charge to the Parish. Another exception was, that it appears not that the Justices had any power, to make any order at all in the case, for it appears not where the Child was born, and so it may be it was born in an other County, where these Justices have no authority to Act any thing concerning it. Upon these exceptions it was quashed.

For a certiorari to remove Indictments out of one of the Cinque-ports. The Court was moved for a certiorari to the Court of Sandwitch, to remove four Indictments there for shooting in a Gun, and pulling up of a post, because the facts, for which the Party was Indicted, were not done within the Jurisdiction of the Court; But because Sandwitch was one of the Cinque-ports, and it had been a question heretofore whether this Court could send such a writ thither, The rule was only for cause to be shewn why a certiorari should not be granted.

Tory

Tory.

Pasc. 23 Car. Banc. Reg.

TOry brings an Action of Trespass, and false imprisonment against I. S. simul cum aliis. &c. The Defendant pleads not guilty, and a Verdict is given against him for the Plaintiff; It was moved in Arrest of Judgement, that the declaration was not good, because it declares against I. S. by name solely, and it ought to have been joyntly against him with the others, naming them also, because the trespass was joynt, and not against I. S. alone; but the Court held that the declaration was good, because it was with a simul cum, although the Persons were not named, and said that this was the constant course of the Common Pleas: And that an ejectione firmæ against one simul cum had been ruled to be good, and so used in the Common Pleas, although heretofore it hath been adjudged to the contrary: yet the Judgement was stayed till the other should move.

Arrest of Judgement in an Action of Trespasse.

Declaration.

Ejectione firmæ.

Jones against Young.

Pasc. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1857.

JOnes brings an Action of Assault and Battery against Young, Young justifies as servant to I. S. because, that Jones came to fish in the several Piscary of his Master. Judgement was given for the Defendant: A writ of Error was brought, and two exceptions taken. 1. That whereas Young, had in his Plea of Justification entitled his Master to the several Piscary by the Kings Letters Patents, he had not shewn that the King was seised of this several Piscary jure Coronæ, and so it might be the King had no power to grant it. 2ly. He doth not shew his Letters Patents, which he ought to do, because he derives a title by them; The rule was to shew cause Saturday next why the Judgement should not be reversed.

Error to reverse a Judgment against the Plaintiff in Trespasse.

Title.

The Earl of Leceſter against Mrs. Samford.

Pasc. 23. Banc. Reg.

IN a Trover and Conversion, brought by the Earl of Leceſter against Mrs. Samford for certain Jewels, the Trover being laid to be in Kent, but the Offring the goods to sell, being the Conversion of them being in London; It was doubted where the tryal should be, and the Court sayed, that generally a transitory Action is to be laid where the fact was done, yet the Party is not tyed to lay it there, but may lay it in another County, and in this case it was held by the Court, that the Plaintiff may bring his Action where the Jewels were sold, and that was in London, as well as in Kent, where the Trover was laid, for part of the ground of the Action to wit the Conversion was in London, though part of it, namely the Trover, was laid to be in Kent.

For levying the venire in a Trover and Conversion.

Venire.

Trover.

Basely

Basely and Baseley.

Pasc. 23 Car. Banc. Reg.

Error to reverse a Judgment in Norwitch.

Tales.

A Writ of Error was brought to reverse a Judgement given in Norwitch, and the Error Assigned was, that there did but five of the Jury empanelled appear at the tryal, and yet a Verdict was given, and Judgement thereupon. The Court said that a Corporation cannot grant a tales, neither if they could, doth it here appear that there was a tales granted, and therefore reversed the Judgement.

Sir VVilliam Bronker.

Pasc. 23 Car. Banc. Reg.

Habeas corpus, for one committed by a Justice of peace for refusing to find sureties for the good behaviour

Good behaviour.

Imprisonment

SIr William Bronker was brought before a Justice of Peace, upon an information made, that he had cheated one at play with false dice: the Justice requires him to find sureties for his good behaviour, and upon his refusal commits him to Prison. Sir William Bronker brings his habeas corpus in this Court, and upon the return this matter appear'd, the Prisoner prayes by his councell to be delivered, because there appeared no matter sufficient upon the return why he should be committed, but because the Gaoler desired time to amend the return, the Court granted it, and would not deliver the Prisoner, but took bail for his appearance, viz. the Earl of Dover, and Earl of Chesterfield. And the Court then said, that a Justice of Peace cannot bind one to the good behaviour upon a general information, or commit him to Prison for refusing to find sureties for his good behaviour upon such information.

VVroath and Elseye.

Pasc. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1224.

Demurrer to a plea in Debt upon an obligation.

AN Action of Debt was brought against Elseye an under Sheriff, by Wroath the high Sheriff upon a bond given him to save him harmlesse, &c. the Defendant pleads that he hath saved him harmlesse, to this the Plaintiff demurs, and held a good demurrer, for he ought to have pleaded non damnificatus, and not generally that he hath saved him harmlesse, for that he may do in many things, and yet the Plaintiff may be damnified in some other things where in he was also bound to save him harmlesse. The rule was to shew cause why Judgment should not be given for the Plaintiff.

White

VVhite.

Pasc. 23 Car. Banc. Reg.

A Judgement was given in an Action on the Case brought by an Attorney for these words spoken of him; Thomas White is a perjured Knave, and a suborned Knave. A Writ of Error was brought, and divers exceptions taken, but the principal were two. 1. That the words are not well laid, for they are adjective words, and so not positive enough to ground an Action. 2. The words are not Actionable, because it is not declared, that the party of whom they were spoken was of any Trade, or had any office: But Bacon Iustice over-ruled all the exceptions, and ordered cause to be shewn next day, why the Judgement should not be affirmed. The Case of one Nicholas and Webb was afterward cited, where Judgement was given in the Common pleas for calling an Attorney Knave, which Judgement was said to be afterwards affirmed in the Kings bench, 12 Car. Trin. rot. 102.

Error to reverse a Judgment in an Action on the Case for words.

Case.

Saunderson and Martin.

Pasc. 23 Car. Banc. Reg.

Trin. 22 Car. rot. 867.

A Judgement was given in an Action of Debt upon an obligation, to perform such a promise made by the Obligor, to the Obligee; and a Writ of Error was brought to reverse this Judgement. The Error assigned was, that the breach of the promise was not well assigned, for it did not appear when this breach of promise was. Bacon Iustice The breach of promise is the sole cause of the Action, and it appears not to the Court when that was, and for this he reversed the Judgement.

Error to reverse a Judgment in Debt

Paine and Skeltrom.

Hill. 23 Car. rot. 740.

AN Action of Debt was brought upon an obligation, the condition was, that Skeltrom the Defendant with his Wife should appear at the Marshals Court, and for not appearing according to the condition was the Action brought: Skeltrom appears and pleads, that at the time of the obligation he was solus et innuptus. To this Plea the Plaintiff demurrs. Rolle Iustice said, this Plea was not the same with ne unques loyalment accouple, for one extended to a feme de facto, and the other to a feme de jure. The Court then advised of the Plea. but Trin. 23 Car. ruled to shew cause tomorrow why Judgement should not be given for the Plaintiff.

Demurrer to a Plea in Debt upon an Obligation.

Stoughton and Day.

Pasc 23 Car. Banc. Reg.

Demurrer upon a Declaration in Debt upon an Obligation.

STOughton an undersheriff brings an Action of Debt against Day one of his Bailiffs, upon an obligation with a condition to save the undersheriff harmlesse in executing of processes, and other things contained in the condition, and Assignes the breach of the condition to be, that the Bailiff had not Executed such his warrant sent to him upon a processe to him directed out of the Exchequer to levy issues upon certain lands. To this declaration the Defendant demurs, and shews for cause, 1. That the warrant to him directed by the undersheriff, was made out of the County where he was undersheriff, and so could not be said his warrant as undersheriff of that County. 2. It is not alleged, that the mannour of Addinson, where he was by the warrant to levy the issues, is within the Hundred where the Bailiff hath Jurisdiction; And this the Court held to be a good exception, and said, that the breach Assigned is not shewed to be within the Condition of the Obligation; because the Baily cannot execute a precept out of the Hundred where he is Bailiff; and Thereupon the rule was that the Plaintiff Nil capiat per billam, if cause were not shewn Tuesday following.

Warrant.

Cook and Fincham.

Pasc. 23 Car. Banc. Reg.

For vacating a Writ of Execution.

A Judgement was given for Cook, upon an information upon a Statute, exhibited by him on the behalf of the King and himself, where the King was to have ten pounds of the penalty recovered: Cook takes out an Execution upon this Judgement, to levy the whole sum of money recovered to himself; as appeared to the Secondary upon examination of the matter referred to him. Upon this the Court held the writ of Execution to be ill; because it was entire for the whole sum recovered to the party, whereas 10 l. was due to the King, and ordered a new Writ of Execution, and to stay the money in Court, till further advice of the matter taken.

Execution.

Clark and Pew.

Pasc. 23 Car. Banc Reg.

Arrest of Judgement in an Action upon the Case.

AN Action of Trover and Conversion was brought by Clark, against Pew and his wife, and the Declaration was, that the goods were found by the Baron and Feme, and were converted ad usum suum, whereas it ought to be in the plural number, to wit, ad usum eorum, or ad usum of Pew and his wife; for as it was, it supposed the Conversion to be made only by the Husband, which is contrary to the Action it self, which is brought against both. Upon this Judgement was stayed till the other should move.

Long

Long and Bennet,

23 Car. Banc. Reg.

LOng brings an Action upon the Case against Bennet, and declares, that he would not suffer him to take unum Acrum ligni which he had sold to him in such a place. After a Verdict for the Plaintiff, it was moved in Arrest of Judgement, that the Declaration ought to have been unum Acrum bosci, and not ligni, for that was uncertain. The Court said, they would Advise of the exception, because it was in an Action of the Case. The same Term Judgement was given, because Damages only were to be recovered, and the words used were but inducements to describe the thing for which Damages only were demanded, yet it might have been more properly expressed.

Arrest of Judgement in an Action upon the Case.

Declaration.

Barker and Martyn.

Pasc. 23 Car. Banc. Reg.

THe Plaintiff brings an Action of Trespasse, and declares against the Defendant for breaking his house, and taking away quinque Instrumenta ferrea; Anglice, Fetters: and a verdict was for the Plaintiff. It was moved in Arrest of Judgement, that the word Instrumentum is not a word that signifies Fetters; but that it is so general a word that it may expresse any other thing as well, and that the Anglice joyned with it, to interpret what it means, cannot help it, because there is a proper Latin word which might and ought to have been used to expresse Fetters by. Rolle Justice said, that by the Statute all pleadings ought to be in Latine, and every particular thing therein ought to be expressed by a Latin word, if there be a proper Latin word for it, as here there is, and therefore the proper Latin word being not used, but another which cannot signifie the thing, the Anglice doth no good; but part of the Declaration shall be judged to be in English, and so it cannot be good. And judgement thereupon was staye dtill the other should move.

Arrest of Judgement in an Action of Trespass.

Pleadings.

Curtice and Columbine.

Pasc. 23. Car. Banc. Reg.

Mich. 22 Car. rot 433.

CUrtice brings an Action upon the Case against Columbine upon an Assumpsit by paroll, to find meat, drink, lodging, &c. for the Plaintiff, and to teach him the trade of a mercer. This agreement was afterwards by consent of both partyes put into writing. Upon the tryal the Plaintiff obtains a Verdict upon the paroll agreement, and hath Judgement thereupon. The Defendant brings his Writ of Error in this Court, and Assignes for Error, that there was no Assumpsit declared upon, or proved sufficient, to warrant the Verdict and Judgement, because that by reducing the Agreement to writing, the paroll agreement became ipso facto void, and so no Action could be brought upon it; but it ought to have

Error to reverse a Judgement in an Action upon an Assumpsit.

been brought upon the Agreement expressed in the deed, and the issue ought to have been joyned upon that, and not upon the verball Agreement, which is void. The rule of Court was to shew cause why Judgement should not be reversed.

Barker and Martin.

Pasc. 23 Car. B. R.

Arrest of Judgement in Trespasse.

BArker brings an Action of Trespass for an Assault and Battery against Martin, simul cum, &c. and hath a Verdict against him. It was moved in Arrest of Judgement, that the Action ought to have been brought particularly, against the other Trespassors together with the Defendant, and not against the Defendant in particular, with a general simul cum against the rest, which is uncertain, and signifies nothing against the rest, and the rather, because the Action is commenced by bill, and not by original; although it could not be good though it were by original: but it was said by Rolle Iustice, that it may be the Plaintiff could not Arrest the other Trespassors, and that he will do it when he can, and that he may Trespasse. well proceed against them at divers times as he can take them, but that whensoever he shall have had satisfaction for the Trespass done him from any one of them, he cannot proceed against any of the rest; and it was ruled that Judgement should be entred.

Cook and Allen.

Pasc. 23 Car. Banc. Reg.

Iudgement reversed because the Venire was i'l. inferior Court Common pleas.

A Iudgement given in an inferior Court was reversed in this Court, because the Venire was, Venire facias, &c. and did not shew from what place the Venire should bee, which, by Rolle Iustice, ought to have been expressed at large, it being in an inferior Court, and not with an, &c. although the use of the Common pleas be to make the Venire short, with an, &c.

The King and Holland.

Entred 16 Car.

Argued Pasc. 23 Car. Banc. Reg.

An argument upon a special Verdict.

THe case was in effect this. A Copphold was surrendred to I. S. in trust, that Holland an Alien, should take the profits thereof to his own use, and benefit, upon this an inquisition was taken for the King, and this matter found: whereupon the lands were seised into the Kings hands, and upon a tryall concerning these lands, a special Verdict was found, comprising the aforesaid matter. The case was argued against the Kings Title, by Mountague of the Middle Temple, and for the Kings title, by Hales of Lincolnes Inn. The substance of Mountagues Argument was, 1. To consider the nature of the trust; 2. The nature of the land out of which the trust was raised: and for the first he held, because

cause it was a trust for an Alien to take the profits of the land, and in that the Alien had no estate in the land; therefore the King could not have it, as he might have had the land if the Alien had had any Estate in it: and is said that this trust was a thing only in Action, and lies in privity, and not to be seised upon by another; and said a Villein was a parallel Person in law to an Alien, in respect of purchasing of lands, and had a Copyhold been surrendred thus in trust for a Villein, the Lord should not have seised it; and this is but a trust not Executed, which is in the nature of a use at the Common law, and not as it is now by the Statute: besides, this trust is raised out of Copyhold lands, and therefore the King cannot seise the lands which the Alien hath not, for if he should, the Lord of whom the land is held, would be prejudiced; and he cited Beverlyes case 4. rep. 126, and a case in 23 Eliz: Hales on the other side Argued, that the King shall have the trust, and laid these two grounds. 1. That there may be a trust raised upon the surrender of a Copyhold; and 2ly. that the surrender settles the trust in the Alien, and cited 11 H. 4. 26. and he said these things were considerable, 1. Whether the King shall have any thing, and what he shall have; 2. Whether he shall have a use for an Alien at the Common law, or a trust; 3. Whether he shall have a trust raised out of a use. And for the first, he said, that the trust was not a thing meerly in Action, but an hereditament; and partly in possession. and cited Cooks Institutes 469. and said, the reason why an Alien may not purchase lands is, because that this Kingdom might not be impoverished thereby, by transporting the revenues of the land into a forein Country, and putting a part of it under the subjection of a forein Prince, and the same reason comes to the case in question, and therefore is not to be suffered; and every Alien that purchaseth is said to purchase to the use of the King, and so shall it be in this case, and although a thing meerly in Action is not transferable to a Common person, yet is it transferrable to the King: but this case is stronger for the King, for here is not a thing meerly in Action but mixed with an interest, and it is no reason, but that the law which was made to meet with the subtility of such Alien purchasors, should take place here; and it cannot be said that that law was made to give remedy to the King for that he had before, and a Feoffment now made in trust for an Alien is all one with a use at the Common law; and he cited 19. Jac. that trusts made to St. John Daccombe of Annuityes for the Lord Summerset attainted of Treason were adjudged to be forfeited: and he held, that there is no difference between a trust raised out of a Copyhold and other lands, and if he hath an interest here in the profits, the seisure is good, though he have no interest in the land, for the land may be seised by the profits; 5 H. 5. fol. 9. But Rolle Iustice demanded of Hales, how the King shall be intitled to the profits of the land, where he is not intitled to the land it self? and said, that the Chancery cannot compell one to Execute a trust for an Alien, and that a trust was invented only to avoid the Statute of uses, and said, that a trust is not a thing in Action, but may be an inheritance or a Chatell as the case falls out. Adjourned post. Daccombe. Title. Chancery. Trust.

White and Pynder.

Pasc. 23 Car. Banc. reg.

Mich. 22 Car. rot 440.

Demurrer upon an evidence.

IN an Action of Trover and Conversion, there was a demurrer joyned upon the evidence; and thereupon the Court directed the Jury to find damages for the Plaintiff, if upon the argument of the demurrer the law should be adjudged for him, and then the parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the law upon the evidence. In this case Rolle Justice took this difference, to wit between pleading of a Record, and giving a Record in evidence to a Jury. If it be pleaded it must be sub pede sigilli, or else the Judges cannot judge of it. But if it be given in evidence, though it be not sub pede sigilli, the Jury may find it, if they have other good matter of inducement to prove it. And the partyes in this case were advised by the Court for their own expedition, to let there to be issued a venire facias de novo, and to waive the demurrer upon the evidence, because it was not good, nor could bring the matter in question before them that they might determine it, for one party saith there is a writ, and the other saith there is not a writ, which is bare matter of fact, and not for us to determine but for a Jury, and the demurrer ought to have been whether the writ be good or whether it be bad, and should have admitted that there was a writ eyel quel, and then had the whole matter come legally before us, to wit, whether the evidence given to the Jury be sufficient for them to find a verdict for the Plaintiff upon the issue joyned or not. But the Court will advise.

Record.

Plea.

Evidence.

Hamond and Kingsmill.

Pasc. 23 Car. Banc. Reg.

Arrest of Judgement in an Action of the Case for words.

HAmond brings an Action upon the case against Kingsmill for these words, spoken of him in relation as he is a Justice of peace, to wit Mr. Hamond did put in of his own head these words in an examination taken by him, viz. I. S. did steal twenty sheep of such a mans, and for speaking these other words of him; Hamond was a debauched man, and is not fit to be a Justice of peace, and hath a verdict against the defendant, who moves in Arrest of Judgement that neither the former nor the latter words were actionable, for for the former words, that he did of his own head put in words into the examination, are words uncertain, and dubious what is meant by them, whether that he added any thing of his own invention, to the examination which was not confessed by the examinant, or that he only put the substance of the matter confessed into words of his own endicting, and if he did no more that was justifiable, and so it shall be taken here rather

ther than in a worse, and strained construction to ground an Action upon: and for the second words, to say that he was a debauched man, and not worthy to be a Justice of peace, they cannot be scandalous. for they are spoken of him in relation to what he was in time past, before he was a Justice of peace, and not as he was at the time of the speaking, and it is no scandall to say, a man hath been debauched, for it may be he is now otherways es. But for the first words it was answered by the Councell on the other side, that they were actionable, for they must be taken according to Common construction, viz. that he had added not only words of his own invention to the examination, but the matter it self expressed in those words which was not confessed by the examinant. And as to the latter words, it was answered they were also Actionable: and a Case was cited where Judgement was given against the Defendant for saying of one, that he was a corrupt Judge. Rolle Iustice was of opinion, that the first words were Actionable, but not the second. for words saith he ought to be taken according to usuall, and Common construction, though they are not to be strained, for otherwise a man may be abused by subtility, and shall have no remedy, and Judgement may be given here for the first words, and not for the second, the Damages being severall, but if the Damages had been intire there if Judgement could not be given for both the words, it cannot be given at all. Bacon Iustice much to the same purpose as Rolle, and said, that the first words shall be meant, that he added words of his own invention without any instruction of the party, for oftentimes dubious words shall be taken in the worse sense upon consideration of the Circumstances that accompany them, and he was also of opinion that the second words were actionable, and are as scandalous as the former. Judgement was given for the former words, and for the latter the Court would advise. Case. Judgement.

Barrett.

23 Car. Banc. Reg.

AN Action of Trespasse was brought for digging in his land, and carrying away a certain number of loads of earth, and a Verdict was for the Plaintiff. It was moved in arrest of Judgement that the declaration was incertain, for the Trespasse is laid to be done in land, lying in divers Towns. 2ly. It is not shewed what kind of soil the earth was that was carved away: but both the exceptions were over-ruled, and Judgement ruled to be entred nisi causa, &c. Arrest of Judgement in Trespass.

Conisby and Fairfax.

Pasc. 23 Car. Banc. Reg.

A Judgement was given in an Action of Trespass in the Court of Owsebridge in York, & a writ of Error for was brought in this court to reverse the Judgement, many exceptions not material at all were taken, and many Error to reverse a Judgement in Tresspasse.

others that were helped by the Verdict; but the three chief Exceptions were. 1. The Damages were declared to be ad valentiam quingint. librar. instead of quingent. for there is no such word as quingint, to express any number, for if it be meant to express Fifty, it ought to be quinquagint. but quingent. signifies 500. 2ly. The Venire was directed Balivis de Wapentagio, whereas there is no such word, for the word to express a Wapentake is Wapentachium, so that it ought to be de Wapentachio, and not Wapentagio. 3ly. The Venire is, Venire facias de baliva, and sayes not what Baliwick, which is uncertain, and it cannot be known, whither it extends. and upon these Exceptions the Judgement was ruled to be reversed, except better matter shewn Saturday following.

Venire.

Pasc. 23 Car. Banc Reg.

For quashing an Endictment for using the Trade of a Baker.

Upon a motion for quashing an Endictment against a Baker, these Exceptions were taken. 1. He is indicted for using facultatem pistoris, and doth not say panis humani. 2ly. It is for baking panis tritici, Anglice, Houshold bread, whereas it signifies only bread made of Wheat, and not Houshold bread, for that may be made of other corn. 3ly. For baking panis Assisæ without a dash for panis Assisæ. Upon these Exceptions it was quashed.

Pasc. 23 Car. Banc. Reg.

For quashing an Endictment for arresting and imprisoning one.

Upon a motion for quashing an Endictment against one for apprehending I S. & imprisoning him, these Exceptions were taken to it. 1. It sayes that he apprehended & imprisoned the party without a Warrant, whereas it ought to have been absque aliqua rationabili causa, for in some Cases a man may be apprehended and imprisoned without a Warrant, but in no Case without a reasonable cause. 2ly. The Endictment is, that he did not shew him the cause why he apprehended and imprisoned the party, and that he is not bound to do, and yet the party may be lawfully imprisoned. 3ly. The Endictment doth not say, that he apprehended and imprisoned the party falsely, as it ought to have done. Upon these Exceptions it was quashed.

Drake and Whitacre.

23 Car. Banc. Reg.

Hil. 22 Car. Rot. 1318.

Arrest of Judgment in an Action upon the Case for words.

An Action upon the Case was brought, and a Verdict found for the Plaintiff for these words, Margaret Whitacre (viz. meaning the Plaintiff) did steal my Wood, and I will send her to Bridewell. It was moved in arrest of Judgement that the words were not actionable, for doubtfull words as these are ought to be taken in mitiori sensu, and Wood here may be understood standing Wood, and not Wood cut down, and so it could not be Theft but a Trespass: on the other side it was answered, that Wood shall here be understood Wood cut down, and not standing, and being coupled with the words Margaret Whitacre is a Thief, which are scandalous words, they shall be interpreted equally scandalous, Ayre & Higgins his

Case

Case was cited to prove it, where it was adjudged that these words, He is a thief and hath stollen my Corn, shall be understood of Corn cut down, and not standing, and therefore are actionable. Roll Justice said, it was a strong Case that the action will lye. Notwithstanding Judgement was arested till the other should move. This was again moved Trin. 23 Car. and the Court held, that the first words alone were actionable, but whether coupled with the other they were actionable, the Court was divided, viz. Bacon a gain the Action, and Rolls for it. Case.

Pasc. 23 Car. Banc. Reg.

IN an Action of Trover and Conversion, and a verdict for the Plaintiff, it was moved in arrest of Judgement that the Plaintiff did declare for Books & for Stockings found & converted, and doth not shew what Books, viz. whether English, or Latine, or what other Language, nor whether Law-books, Divinity, Physick, or of any other Subject, and because he doth not declare what sort of Stockings they were, whether wollen, worsted, or silk, &c. But the Court over-ruled the Exceptions and said, that Books were not things of divers species, be they of what Language or subject they may be of, neither the Stockings, for were they silk, or wollen, or worsted, they were but Stockings, and so ruled Judgement to be entred. Arest of Judgment in Trover and Conversion. Species.

The King and Place.

Pasc. 23 Car. B. R.

PLace was endicted before the Lord Finch and Justice Crawley for speaking words against the Queen Mother of France, the words were these, The Queen Mother is the Whore of Babylon, she is a Whore and hath had a Bastard; upon this Endictment judgement was given against the Defendant. A Writ of Error was brought in this Court to reverse the judgement; The Errors assigned were, 1. That the proceedings upon this Endictment were too speedy, and so illegal; for the whole proceedings upon it were acted in one day. 2ly. The Endictment lyes not, for it is founded upon the Statute of Scandalum magnatum, and here can be no such great Scandal, for that is for words spoken of a Peer of the Realm, and the Queen Mother is not so. 3ly. There is no Capiatur upon the Roll, as it ought to have been, the Defendant being not in Prison at the time of the judgement given. 4ly. The judgement is that the Defendant shall be imprisoned for a year without bail or mainprise, whereas he ought to be delivered upon paying his Fine. Adjourned to the next Term. Error upon a Judgement given upon an Endictment for words. Scandalum magnatum.

Pasc. 23 Car. Banc. Reg.

AN action of Debt was brought upon a Bill penall, and a verdict for the Plaintiff. It was moved in arrest of judgement, That the Plaintiff hath not shewed, that the Defendant did not pay the mony at the day limited in the Bill, but only says, non solvit, &c. 2ly. He declares, that the Defendant was bound to pay such a sum Legalis monetæ, and doth not say Angliæ, but the Court over-ruled both the exceptions, and ruled the Plaintiff to take his Judgement. Arest of Judgment in Debt upon a Bill penal.

Pasc. 23 Car. Banc. Reg.

For a Writ against a vill to make them keep their Fences. Scire facias. Plea.

A Motion was made by one Town against another neighbour bordering Town, for a Writ to make them repair their fences; And it was granted, but it was said by the Court, that the Writ so granted should be but in the nature of a Scire facias returnable in this Court, to enable them to plead to it, and not to compell them to do it without being admitted to plead. Notwithstanding the opinion of Noy Attorny General, and the old Record of Ed. the 2ds. time produced heretofore by him to strengthen it Nota.

Trin. 23 Car. Banc. Reg.

To stay Process for a Deodand. Certificate. Notice.

A Motion was made upon an Affidavit to stay Process out of this Court against the party for a Deodand, because he had payed three pound for it to the Kings use to Sub-Deputy Almoner upon a composition made with him, Bacon Iustice, procure the General Deputy Almoner to acknowledge it, and procure his Certificate to the Court, for of the Sub-Deputy we can take no notice.

Trin. 23 Car. Banc. Reg.

To quash an Endictment of forcible Entry. Addition.

THe Court was moved to quash a Endictment of forcible entry upon these Exceptions. 1. There is no addition of the County where the party dwells that made the forcible entry, as there ought to be by the Statute of 1 H. 5. and without this addition no Process can be awarded to out-lawe the party, for it must be directed unto the County where he dwells. 2ly There is no County expressed where the vill lies in which the force was committed. Upon these Exceptions it was quashed.

Trin. 23 Car. Banc Reg

To discharge one endicted for Recusancy. Certificate. Conformity.

AN Endictment was preferred 5 years before, against Count Arundel for recusancy. It was now moved that he would plead Conformity, but in regard that he must plead it by a Certificate under the hand and seal of the Bishop of the Dioces, and Bishops were now taken away by the Parliament, he was disabled to do it, but had a Certificate under the hands and seals of the Minister and Church-wardens of the Parish where he dwelt, upon Oath testifying his Conformity, and thereupon it was prayed he might be discharged. But the Court answered, that there is another remedy given by the Statute, which he might have followed, though the former was taken away, to wit, to conform at the Sessions, and it was his own fault that he hath lost that advantage by removing the Endictment hither by Certiorari, and therefore we will not at present deliver him, but will consider of the Statute, and stay the Process in the mean time.

Trin.

Trin. 23 Car. Banc. Reg.

Against an Injunction out of the Chancery to stay execution.

IT was moved to the Court that there was an Execution duly issued out of this Court and returnable here this Term, and that since it issued forth, the Defendant had obtained an Injunction out of the Chancery to stop the execution. The Court answered, that all the Judges were agreed that an Injunction out of the Chancery lyes not after a Judgement, be the Bill put in before or after the Judgment it matters not, but if after a Judgement there be a Writ of Error brought to reverse it, and pending the Writ an Injunction be obtained, Q. whether it lye or no by the Reporter.

Injunction.

Bruer and Sowthwell.

Trin. 23 Carol.

Arrest of Judgment in an action upon the Case.

BRuer brought an action upon the Case upon an Assumpsit to pay so much mony for Currance sold unto him discomputando for four Months. The Defendant demurs to the Declaration for the incertainty of it, because it is discomputando for four Months, and expresseth not for how much he should discount, and so there can be no certain dammages given, and upon this it was stayed till the other party move. *post: 58.*

Whiteacre and Hillwell.

Trin. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1318.

Action on the Case for words.

VPon a Verdict had for the Plaintiff in an action upon the Case for these words Magaret Whitacre is a thief & hath stollen my Wood, and I will send her to Bridewell, It was again by the Plaintiff moved for Judgement, because the words were actionable, and shall be meant of Wood cut down & not standing; and it was said, though the first words should in themselves be doubtfull, yet are they made certain by the words that are coupled with them. But Bacon Justice denied it and said, that Bridewell is a Prison for Correction, and not the Sheriffs Prison for felons, and that one may be sent thither although the offence be not felony, and that the cutting of Wood standing is to be punished with whipping, and so the party may be sent to Bridewell for that offence, and said, that the last words are explanatory of the former, that he meant not the fact charged upon the Plaintiff to be felony, but had not the later words been added to explain his meaning, the former alone are clearly actionable. But Roll Justice held the words as they are laid to be actionable, and cited Hyfords and Stamps Case, Trin. 11 Iac. & Doleman and Youngs case, 5 Car. and Smith and Wards Case, 21 Iac. and said that in the Case at Bar, that the latter words were cumulative and not interpretative, and that where there are expresse precedent words to make one a Thief, there ought to be violent words subsequent to give them another interpretation, and not words which may be taken by implication, as they are in this Case. Adjourned.

VVatson and VVatson.

Trin. 23. Car. Banc. Reg.

Hill. 22 Car. rot. 1687.

Act on of Debt for not performing an award.

AN Action of Debt was brought upon an Obligation with condition to stand to an award. The Defendant pleads no Arbitrement made: The Plaintiff replyes, and sets forth the award, and Assigns a breach; the Defendant demurs, and for cause shews that the award is uncertain and not finall, for it is, that one of the parties shall pay so much money to the other as shall be due in conscience, and that cannot be known how much it may be, and consequently there is no award, but both parties are at liberty to go to law as they were before, and so no end is made between them by the award according to the intent thereof, and these books were cited against the award, 20 Ed. 4. fol. 1. et 4. 9 H. 7. fol. 14. 8 Ed. 4. fol. 20. It was ruled by the Court to shew cause why Judgement should not be against the Plaintiff per nil capiat per billam.

An incertain award not good.

The King and Place.

Trin 23 Car. Banc. Reg.

Error to reverse a Judgment upon an Endictment upon the Statute Scandalum Magnatum.

THe Case between the King and Place adjourned, Pasc. 23 Car. was again moved, which was this: Place was indicted before Finch and Crawley Justices of Oyer and Terminer, for these words spoken against the Queen mother of France, viz. the Queen mother is the Whore of Babylon, and is a Whore, and hath had a Bastard, and all the Noblemen that will not joyn with me against her, are Rogues and Rascalls. To this endictment the Defendant pleaded, and was found guilty by the Jury, and Judgement given against him: Whereupon he brings his Writ of Error in this Court to reverse the Judgement, and Assigns these Errors. 1. against the body of the Endictment it self, and that he ought not to be Endicted for the words, because they are neither spoken against the Common law nor against any Statute law. 2. Against the proceedings upon the Endictment, which were against law, being too speedy, for he was Endicted before Justices of Oyer and Terminer, and tryed in one day, whereas there ought to have been 15. days betwixt the preferring of the Endictment, and the tryal. 3. The Venire is against law, for the Court did chuse, try, and swore the Jury, which ought not to be. 4. Part of the Judgement is, that the Defendant shall be bound to his good behaviour, which cannot be upon such an Endictment as was before them. 5. The Endictment doth not say, that the words were spoken contra pacem. 6. Part of the Judgement is, that he shall be set upon the Pillory, and lose his eares, which no law warrants, but only to be set there to the view of the people, with a paper on his head. 7. The Judgement is that he shall be imprisoned for a year without bail, which ought not to be. To this last exception the Court answered, the party might be so committed; But they said, that the Justices of Oyer and Terminer cannot try an Endictment the same

Imprisonment

same day, nor Justices of peace at the same Sessions in which it was pre- Tryall.
ferred; and they cited one Barnabyes Case 13 Car. and Pridians Case, 6 Car. & 22 E. 4. et Plow. 44. But they said Justices of Eyr, may try an Endict-
ment the same day; Roll Iustice said, the Kings Bench is a Court of Eyr in
the County where it sits, and therefore they may try an endictment remo- Eyr.
ved here out of the same County the same day, but not if it be removed hi-
ther out of another County, for in that case it is only a Court of Oyer and Terminer. But Bacon denied it, and said so was my Lord Cooks opini-
on, and it was also said that Justices of Oyer and Terminer cannot pro-
ceed upon an Endictment which is not taken before themselves, but Iust-
ices of Gaol delivery may; and the Court also held, that the juratores electi
tryati et jurati by the Court, as it must necessarily be here understood, was Iury.
illegal, for the Jury ought to be electi by the Sheriff out of the County;
and lastly the Court held, that legally there ought to have been 15 dayes
between the Endictment, and the tryal, and for these reasons ordered to
give notice to the Kings Sollicitour, or Serjeant, to shew cause why the
Judgement should not be reversed.

Hill and Farmer.

Trin. 23 Car. Banc. Reg.

Hill. 17 Car. rot. 674.

AN Action of Debt was brought in the Common pleas upon an obliga- Error in Debt upon an obli-
tion; and a Judgement upon a demurrer was given for the Plaintiff; gation
the Plaintiff brings a Writ of error in this Court to reverse the Judge-
ment, and Assignes for Error that the Obligation upon which the Action
was brought, and Judgement was given, is a void obligation by the Sta-
tute of quinto and sexto of Ed. 6. made against buying of Offices. But Roll
Iustice answered, that the Judgement in the Common pleas was given
upon a mispleader there, and therefore you should make that good first
before you move new matter. And there is another Error also in the
pleading, which was not touched upon in the Common pleas, which is this,
first the plea is of the Office of the delivery, within the Office of the Armo-
ry, and after he referrs the plea to the Office of the Armory which is Declaration.
another Office, and so the Declaration is double. Another exception was
that the word Armentarius was used for Armamentarius. Monday following
was given to shew cause why Judgement should not be reversed.

The King and Marshall.

Trin. 23 Car. Banc. Reg.

MArshall brings a Writ of Error to reverse a Judgement given a- Error upon
gainst him upon an Endictment of barratry, and takes these excep- an Endict-
tions. 1. That it doth not appear in the Endictment, before what Com- ment.
missioners the Endictment was taken, upon which the Judgement was

given; and so the Endiament is not good for the incertainty of it, and consequently the Judgement is erroneous that is given upon it, for it ought to appear by the Endiament that it was taken before the Justices of Assise, or Justices of Peace, or of the Gaol-delivery. 2. The Judgement is, quod solvat tantam denariorum summam, and shall find sureties for the good behaviour, and this is rather an award than a Judgement. To this exception Roll Justice answered, if it be a good order it is a good Judgement, and the order is part of the Judgement, yet let the Kings Councell have notice, and the Prosecutor shew cause why the Judgement should not be reversed.

Judgement.

Trin. 23 Car. Banc. Reg.

Arrest of Judgement in an ejectione firmæ.

UPon a verdict given in an ejectione firmæ it was moved in Arrest of Judgement, and the exception was, that the Plaintiff was ejected de uno Crofto, which was said to be of an uncertain signification; and because the Plaintiff conceived the Court doubted whether an ejectione firmæ lay of a Croft, he durst not defend it, but moves for a special Judgement for the rest of the land contained in the Declaration, and prayed that he might release the damages as to the Croft. Rolle Justice doubted whether an ejectione firmæ lyes de uno Crofto, and said that a Formedon lyes not of a Croft, but that an Assise doth, because it is put in view to the recognitors, but a Præcipe lyes not of it. The rule of Court was, that the Plaintiff should take a special Judgement as he desired, and release the Croft, and the damages to all, and that he should have his Costes.

Ejectione firmæ. Formedon. Assise.

Lere and Cholwitch.

Pasc. 23 Car. Banc. Reg.

Arrest of Judgement in Debt upon an Obligation.

LEre brings an Action of Debt upon an Obligation against Cholwitch; the condition of the Obligation was, that a certain sum of money should be paid to the Plaintiff 40 dayes after he should return with his Ship to such a Port of discharge for fraight for his Ship, and for non payment accordingly is the Action brought; The Plaintiff hath a Verdict, The Defendant moves in Arrest of Judgement, and takes these exceptions. 1. That the averment of the breach of the condition of the Obligation is not certain, and therfore not good, for it doth not aver that the Ship was discharged of his Goods, or that the 40 dayes were expired before the money demanded; To this Rolle Justice said, it is not usual to pay fraight for a Ship, till the owners have their goods delivered, but here the condition of the bond is, to pay the moneys within 40 dayes after his return to such a port of discharge, and it is not intended, that the money shall not be paid till the 40 dayes be past. The 2d. Exception was, that he doth not say where the Ship was unloaden; To this Rolle answered, that it shall be intended that it was unladen at the port where she arrived, if the contrary be not shewn on the other side. 3ly. There is no notice expressed to be given of the unloading of the Ship, and this being a collaterall thing, and penall to the Defendant, he ought to have notice of it; To this Rolle said, that one party might as well take notice of this as the other, for the thing to be done is not

Fraight.

Intendment.

Notice.

not to be done either by the Plaintiff, or Defendant, and the issue is found against the Defendant, therefore let him shew cause Tuesday next why Judgement should not be given for the Plaintiff. Afterwards the same Term Judgement was given accordingly.

Segar and Dyer.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 125. or 135

DYer brings an Action of Trover and Conversion, in the Court at Bristow against Segar, and hath a Verdict, and a Judgement against him; Segar brings his Writ of Error in this Court to reverse this Judgement, and Assignes these Errors. 1. To the Declaration which was of the Trover, and Conversion, de uno pullo, Anglice a Colt, whereas Pullus signifies not a Colt, but properly a young Hen, and hence we had the word pullet but in a general acception of the word it may signifie also other young things, but then it must have an adjective of the species which it is to signifie, or a substantive of the genitive case joined with it, as pullus equinus, pullus Asininus or Asini and the like, and ought not to be used alone to signifie a colt, with an Anglice joyned to it, as it is here. The 2d. Exception was, that it is not well set forth, how the Court was held where the Judgement was given, for he doth not shew that the Court was held either by letters patents, or by præscription, but saith ad curiam tentam tali die coram A. D. I. H. &c. a tempore cujus contrarium memoria hominum non existit, &c. which cannot be a good præscription, for a Court cannot be held at such a day, and before such particular persons, if it be not expressed to be secundum consuetudinem. The rule of Court was to shew cause Tuesday following why the judgement should not be reversed.

Error to reverse a Judgement in Trover and Conversion.

præscription.

Trin. 23 Car. Banc. Reg.

THe Plaintiff declares that the Defendant had covenanted with him, to pay him so much money as he should expend for repairing, and victualling a Ship for him, and averrs that he had expended 300 l. in repairing and victualling it, and that he gave the Defendant notice of it at such a day, and for non payment he brings his Action of breach of Covenant. The Defendant protestando that the Plaintiff had not laid out 300 l. in maner and form as he had declared, demurs to the Declaration upon these exceptions. 1. That that the Declaration was not good, because he had not averred a speciall breach of Covenant: But to this Roll Iustice said, that this exception had been often over-ruled. 2ly. It was objected, that in this case the Plaintiff should have brought an Action of Debt, and not of Covenant. But to this also Roll answered, that it was well enough, for it is in the election of the Plaintiff to bring either an Action of Debt, or an Action of Covenant, and that it hath been heretofore questioned, whether an Action of Debt did lye in this case, but it was never doubted but that an Action of Covenant did very well lie. A third exception was, that there is no

Demurrer upon a Declaration in an Action of Covenant.

Election of Action.

Debt.

Demand. no request alleged to pay the mony, and without request he was not bound to pay it. To this Roll answered, that the Plaintiffs Action was not an Action of Debt where a Demand is necessary, but it is an Action of Covenant, and there it is not needfull to allege a Demand.

Boomer and Payte.

Trin. 23 Car. Banc. reg.

Demurrer upon a Declaration in Debt. PAyte the Administrator of the Goods and Chattels of I. S. brings an action of Debt against Boomer, and declares, that the Intestate brought an action of Debt in the Common Pleas against three, and had a Judgement against them, and a Capias ad satisfaciendum against two of them was directed to Boomer the Defendant, being then Sheriff of the County where the parties lived, to execute, and that accordingly he did execute it by taking the parties, and afterwards did suffer them to escape, and for this the Plaintiff brings his Action. To this Declaration the Plaintiff demurs. But Roll Justice said, he saw no cause for it, for an Administrator may have an action of Debt against a Sheriff upon an Escape suffered of a Prisoner of the Intestate in his life time, and ordered the Defendant to shew cause Tuesday next why the Plaintiff should not have Judgement.

Debt.

The City of London and Estwick.

Trin. 23 Car. Banc. Reg.

For restitution to the place of a Common-Councel-man of London. STephen Estwick prays a Writ of Restitution to be restored to the place of a Common-Councel-man of the City of London, being put out of it by the Lord Maior and Court of Aldermen, and also committed to Newgate; the Writ is granted and directed to the Lord Maior and Court of Aldermen, who thereupon make a long return, setting forth at large the causes why he was deprived and committed, and why he ought not to be restored, which in brief was for carrying himself in a tumultuous way at an election of Common-Councell-men, and disturbing the election; this Return was read and filed, and the Councel thereupon prayed he might be restored, because there was not sufficient matter shewed in the Return why he should not be restored, and these exceptions were taken to the Return. 1. That it was too general, and shews not what manner of disturbance Estwick made at the Court where the election was. 2ly. Part of his misdemeanour is set forth to be clamando & vociferando, which are words very uncertain and not proper to set forth a disturbance. 3ly. It was said he was bidden to withdraw, and refused, and it is not shewn why he should withdraw. 4ly. The custom set forth for the Lord Maior and Court of Aldermen to imprison ad placitum is not good, but they should have shewn that such imprisonment belonged to them per consuetudinem, or by the Common-law. 5ly. They say, that they had used to imprison for such causes, and do not shew where the custom is used. 6ly. They say quædam quæstio orta est touching the election of one to be a Common-Councel-man, and shew not his

his ability for the place. 7ly. By the incertainty of the Return the Plaintiff cannot plead to it. 8ly. It is said, that when he was commanded to go forth, he said he would not, but it is not said that he did not go forth. 9ly. It is said that the Court of Common-Council tendred the Covenant, whereas they have no power by Ordinance of Parliament to do it. The Recorder of Councell with the City desired time to amend the Return in matter of form only. And said, that the Plaintiff was removed from his place by a Court of Record, and therefore hoped he should not be this way restored, and that he had no loss by being removed, and therefore the Case was the less considerable; and whereas it was objected against his amending of the Return, that it was filed, & so too late to move for it, He said, that it was not filed by order of Court, but only ordered that Copies might be taken of it for Councell to peruse, and if so then it is not too late to pray it may be amended, but though it were filed he conceived that in a case of this importance it might be amended in matter of form as some Returns had been formerly in this Court. Roll Justice answered the Recorder to this effect, You ought to shew some cause upon which the party may have remedy by a Writ of Error, or otherwise, if Judgement be wrongfully given against him, which you have not done; and as to the filing of the Return, a Return may be filed either upon motion of the party, or by the rules of the Court, and if were good, you consider how this was filed; and as touching the suspension of the party from his place, it ought not to be perpetual but for a time only, and said, that after filing of a Return, be it upon motion or by the rules of the Court, it cannot be amended. Tuesday next following was given by the Court to hear Councel on both parts. post: 55.

Return.

Filing.

Suspension.

Amendme.

Chadly and Stinch.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 556.

Stinch brought an Action upon the Case upon an Assumpsit in the Common Pleas against Chadly, and hath a Verdict and a Judgement. Stinch brings a Writ of Error here to reverse this Judgement, and assigns for Error, 1. That there were 18 returned upon the Jury, and but two of them tryed the issue. 2ly. Part of Declaration to ground the Assumpsit was in another County, and not within the Jurisdiction of the Court where the issue was tryed; and for these Errors the Judgement was reversed except cause should be shewn to the contrary Thursday next.

Error to reverse a Judgment in an Action upon an Assumpsit.

Trin. 23 Car. Banc. Reg.

It was moved to quash an Endictment for erecting of a Cottage contrary to the Statute; the exception taken to it was, that he erected a Cottage for habitation, but did not say it was used or inhabited as a Cottage. But Bacon Justice answered, that the very erection of it is an offence against the Statute, and therefore the Endictment did very well pursue the words of the Statute, and therefore would not quash it.

To quash an Endictment for erecting a Cottage.

VVright and Pynder.

Trin. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 440 antea.

Opinion of the Court on a Demurrer upon an evidence.

Pleading.

Evidence.

Venire de novo.

Judgment.

Jury.

THe Case of Wright and Pynder was moved again to have the Judgement of the Court. Roll Iustice said, that matter of fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer, for the Judges cannot try the matter in fact, for that were for the Judges to give the verdict, which belongs to the Jury to do, and to waive the matter in Law, which they should determine, and he said, that if a Deed be pleaded the party must shew it in Court, but if it be given in evidence it is not necessary to shew it if it can otherwaies be proved to the Jury, and so is it of a Record given in evidence, and cited one Worsleys Case 17 Iac. Rolls Iustice took also two other Exceptions to the pleading. 1. That the Goods mentioned in the Schedule appear not to be the same contained in the Declaration. 2ly. No Title is made to the Indenture by him who brings the Action, and concluded upon the whole matter that the Demurrer was not good, and that there ought to be a Venire facias de novo to try the matter again. Bacon Iustice much to the same effect, but differ'd in this, that there ought not to be a Venire facias de novo but said, that Judgement ought to be given against one party, to wit the Defendant, for ill joyning in Demurrer, to the intent the party that is not in fault may be dismissed, and the parties here have waived the Tryal per pays by joyning in Demurrer. But Roll answered that no Judgement at all could be given, for both parties be in fault, one by tendring the Demurrer, the other by joyning in it, and the Defendant might have chosen whether he would have joyned or no, but might have prayed the Judgement of the Court whether he ought to joyn. The Court advised to search precidents for a Venire facias de novo after a Demurrer upon an evidence, and if there be any, they held that the same Jury ought to come again, and not another. Roll said, if a special verdict be found insufficient, a new Venire facias ought to issue, and he saw no difference between that and this Case.

King and Summerland.

Trin. 23 Car. Banc. Reg.

Opinion of the Court touching pleading of an Enrollment.

IN the Case of King and Summerland again moved, the Court held that the pleading of a bargain and sale to be debito modo irrotulatum secundum formam statuti is good enough, though it be not pleaded to be inrolled within six months, yet ruled it should be moved again. The same term Judgement was given, that the Plaintiff nil capiat per billam, because the Deed was not said to be enrolled, neither secundum formam statuti, nor within six months, but only debito modo, which may be an Enrollment at the Common law, and not according to the Statute.

The

The City of London and Eſtwick.

Trin. 23 Car. Banc. Reg.

The Court was again moved in the Caſe between the City of London and Eſtwick, that the return of the City might be amended although it were filed, becauſe there are Preſidents where it hath been done. Roll Iuſtice anſwered, there was never any amended after the filing before H. 7ths. time. It was replyed by the Councel, that the return being of this Term it might be amended, for it reſted in the breaſt of the Judges. But Roll Iuſtice anſwered to this, that Acts of the Court remain in the breaſt of the Court the ſame Term, but not acts of others, and therefore this being ſo was not amendable, and ſaid, that inferiour Courts cannot amend a preſentment in matter of fact, for that were to alter the cuſtom of the courts; and it was then ſaid, that Endictments had been amended after the filing of them. And Alderman Langhams Caſe was alſo urged, where a return of the City was amended after it was filed, yet this was ruled not amendable. Twiſden of Councel with the City argued that Eſtwick ought not to be reſtored to his place of a Common-Councel-man for theſe reaſons. 1. Becauſe it was not a place of profit, and ſo it was no damage to him to be removed, and therefore his ſute was to no purpoſe. 2ly. It is not a place of Government, and ſo no dignity in it, but it was a place meerly of ſervice and trouble. But Roll Iuſtice anſwered, that a writ of reſtitution had been adjudged good to reſtore a Conſtable to his place, which was more a place of ſervice and trouble than this. 3ly. There is a judgement againſt Eſtwick in a Court of Record, and it muſt be avoided either by error or attaint, as the Statute directs, and the partie cannot be reſtored by a Writ of Reſtitution; and for the objection, that the Return is too general, he anſwered, that Faith is to be given, that there was a diſturbance made by him as is ſuggeſted, though it be not ſo plainly expreſſed as it might have been. 2ly. Here appears a contempt to the Court, and for this he may be ſuſpended. 3ly. The Cuſtome is well purſued upon the whole matter taken together. 4ly. The Cuſtome is well laid for the commitment ad placitum, for it refers to the words ſuſpendere vel amovere, that is, either one or the other. 5ly. The word require amounts to a command being ſpoken in a Court of Record, and the diſobeying it was a contempt. Hales of Councel on the ſame ſide argued much as Twiſden had done, and added to it as followeth. 1. That there appears a reaſonable cauſe precedent why he ſhould be ſuſpended, and then it follows they may ſuſpend him ad libitum. 2ly. The alleging of the diſturbance is not material, for that is not the ground of his amotion from his place, but only the inducement to it. 3ly. Requiſitus ſhall be underſtood requiſitus per curiam, it being alleged to be in Court. 4ly. Recuſavit is more than denegavit, and implies he did not the thing enjoyned him, and ſo might well be committed. 5ly. There may be cauſe to grant a Writ of reſtitution, though no cauſe for the reſtitution: For a common-Councel-man of Coventry had a Writ of reſtitution out of this Court, and yet upon his ſute was not reſtored. The Recorder moved for a longer day to be heard for the City, becauſe it was a weighty cauſe, and ſaid that no reſtitution could be made, for the Writ was not well directed, and ſo is not well executed. The Plaintiffs Councel deſired expedition in the Cauſe; Whereupon Roll ſaid, here hath been no delay in the buſineſs, but the rule is againſt you, and

A. d. 32. Argument concerning the Writ of Reſtitution to a common-Councel-mans place. Amendment. Reſtitution.

he took these exceptions to the Return. 1. It appears not by the return that the Plaintiff is removed from his place, but only that he is suspended, and then he may well be restored, and it is not said for how long time he is suspended. 2ly. It is not said that he is suspended for a reasonable cause. 3ly. It is not said what the disturbance was that he made for which he is suspended. And further said, that the Court of the Common-Council is not a Court of Record, for no Writ of Error lies there; but is a Court only of Advise. Bacon Justice as Roll, and said, that Estwick had only remedy to be restored by a Writ of Restitution, and not by a Writ of Error or an Attaint. Adjourned till Saturday to hear Council for the City.

Error. Restitution.

fol. 42.

Rawson and Bargue,

Trin. 23 Car. Banc. Reg.

Hil. 17 Car. rot. 904.

Argument upon a special Verdict for Tithes in an action of Debt upon the Statute of 2 Ed. 6.

RAwson brought an Action of Debt against Bargue for 15 l. upon the Statute of 2 Ed. 6. for setting forth of Tithes. And upon the Tryal a special verdict was found, wherein the Question was, whether the Church by reason whereof the Tithes were claimed were a free Chappel, and given to Ed. the 6th. by the Statute of 1 Ed. 6. and so discharged of Tithes or not. Walker of Council with the Plaintiff argued, that it was not a free Chappel, because there was a cure of Souls, and so could not be free but presentative, and said that the word free was a word of distinction to distinguish things of different nature one from another, as liber homo is to distinguish a free man from a villein, Franckfold, Franchtenement, and the like, and cited Bracton lib. 4. C. 3. 241. He likewise distinguished Chappels into three sorts. 1. Donative. 2ly. Presentative. 3ly. Without cure of Souls, and said, that Chappels presentative were not given to the King by the Statute of 2 Ed. 6. and cited Nat. brev. 48. and 33 E. 4. f. 4. and 6 H. 7. c. 24. and 5 H. 7. f. 37. and said, that it is not within the meaning of the Statute of 1 Ed. 6. to give Chappels presentative, because it is not within the mischief which the Statute was made to prevent, and so intends not to give Chappels with cure of Souls, and the word free is but nominal, and doth not make it free if it be not so otherwise. Hales for the Defendant argued, that it was a free Chappell within the Statute of 1 Ed. 6. For first it is called so, and it shall be presumed it is rightly named so. 2ly It is so found to be by the Jury, and to prove that it is a free Chappell it is not presentative, and 2ly. It appears not to be within the Jurisdiction of the Ordinary. 3ly. The Act of 1 Ed. 6. is an Act which is general and gives all free Chappels, and extends as well to Chappels which are only reputative free Chapbels as well as to them which are so indeed, even as it is of a Chauntery, College, and an impropriation, as the Books are, and it is a free Chappell nevertheless it be presentative and with the cure of Souls, for a free Chappel may now be with the cure of Souls, although by the old Canon law it could not, as was held in Childs case, 1 Iac. The Chappel within the Tower is a free Chappell donative, and yet it is presentative and hath cure of Souls, so saith Lynwood of the free Chappel of St. Martins. It is also the intent of the Statute, that it should be so, for a College

lege and a Chauntery with cure are within the Statute, as may appear by the Exceptions of the Statute of the Free Chappel with cure of Souls in the Isle of Ely called the Chappel of the Sea, and the being presentative with cure hinders not, but that it may be within the Statute, for the presentation might arise at the first by special composition, as it is 13 E. 4. f. 4. and Register f. 307. and it was instanced in the free Chappel of Hastings in Sussex, and it may be a Chappel donative by prescription, and yet presentative. Adjornatur ad proximum terminum to be argued again. Vid. postea.

Barker and Martyn.

Trin. 23 Car. Banc. Reg.

The case between Barker and Martyn was again moved, which was briefly this, An action of Trespass was brought by Barker against Martin, wherein he declares, that the Defendant had broken his House, and had taken away quinque instrumenta ferrea, Anglice fetters. In arrest of Judgement exception was taken to the Declaration, that Instrumenta ferrea, Anglice fetters, was not a good expression in Latin (as it ought to be) of Fetters, because there was a proper Latin word for Fetters, namely Compes, so that it ought to have been quinque Compedes, or quinque paria Compedum, and not as it is, for the word Instrumentum is uncertain, and may be used to signifie any thing else with an Anglice added to it as well as Fetters, and as it is the pleading is not all in Latin as the Statute directs to avoid Barbarism, and the word Anglice when it is properly used in a Declaration is to help words of art, which cannot be expressed without an Anglice, and is not to be used where there is a proper Latin word to signifie the thing, as in this Case there is. On the other side it was said, that general words might be good in a Declaration, and barbarous words sometimes, and cited Hobarts Reports, 267. and Ward and Smiths Case, Trin. 4 Iac. rot. 2305. Roll Iustice, It is a hard thing to maintain this Declaration, for if it should be admitted good it would bring in all Barbarism in pleadings, and any senseless word might be used with an Anglice joyned with it, and he said one was endicted for using quandam artem Anglicè of a Draper, and it was adjudged naught, and in the case between Tailour and Taylour 9 Car. Trespass was brought pro Decem caponibus, Anglice Capons, & avibus domesticis, Anglice powltry, and adjudged not good. Yet the rule of the Court was to argue it again Saturday next following.

Arrest of judgment in Trespass.

Declaration.

Pleading.

Eeles and Lambert.

Trin. 23 Car. Banc. Reg.

Pasc. 22 Car. rot. 1646.

Eeles brought an Action of Covenant against Lambert the Executor of Sir Molton Lambert, and declares that Sir Molton Lambert did in his life

An action of Covenant against Executor, an Ex-

life time by his indenture let certain lands unto him for years, and covenanted thereby for himself, his Executors, Administrators, and Assigns, that the Lessee should not be put out of possession of the lands let by him during the said Term, and that since the death of Sir Molton Lambert his Lessor, he was put out of possession by such an one, and upon this he brings his Action of Covenant against the Executor. The Defendant pleads, no Assets, upon this an issue was joyned, and a special Verdict was found, To this effect, That Sir Molton Lambert did let the lands mentioned in the Declaration to Eeles prout, that there was such a Covenant in the Deed prout, and that the Plaintiff was put out of possession of the lands prout. They find likewise, that Sir Molton Lambert made his Will, and made the Defendant his Executor, and died; that Sir Molton Lambert by his will gave many legacies of goods, and that the Defendant before the Plaintiff was put out of possession, did pay all the Legacies in kind, and that besides those Legacies he had not Assets to discharge the Covenant. Upon this Verdict the matter in Law was this, whether the Executor ought to have forborn the payment of the Legacies, and to have expected till the end of the Term let to the Plaintiff, or till the Covenant had been broken, and for doing otherwise should not be charged with the Covenant de bonis propriis; or whether the Covenant not being broken in the life of the Testator, nor before the Legacies paid, he had not paid the Legacies as he ought, and should not be freed from being charged with the Covenant de bonis propriis. Upon opening of the Case Rolle Justice said, that a decree in Chancery against an Executor, shall not be satisfied before an Obligation made by the Testator, and become due after his death. Saturday following was set to here Councell again.

Decree in Chancery.

Jones and Stanley.

Trin. 23 Car. Banc. Reg.

Arest of Judgment in an Action of Debt.

JOnes brought an Action of Debt upon an Obligation to perform Covenants of an Indenture against Stanley, and hath a Verdict against him; Stanley moves in Arrest of Judgement, and takes these exceptions; 1. That the Goods valued in the Declaration, are not within the condition of the Obligation; 2. The goods are not certainly set forth what they are, for the Declaration is of divers parcells of old stuff; 3. Some of the things mentioned in the Declaration are not goods, and so not to be valued, for the Declaration is of partitions within the house, and of a shed, which are part of the free hold, and not goods; upon these exceptions the Judgement was arrested till the other should move it.

VVhite and Thomas.

Trin. 23 Car. Banc. Reg.

Trin. 18 Car. rot. 1400.

Error to reverse a Judgment in Debt brought by an Heir.

VVHite binds himself, his Heirs, Executors, and Administrators, in an Obligation to Thomas for the payment of a certain summ of mony,

mony at a certain day, the mony is not paid, a Judgement is obtained against White for the mony, White makes his will, and makes his Heir at law his Executor, and dyes leaving lands to descend. White as Heir brings a Writ of Error to reverse this Judgement; It was argued by the Councell of the Plaintiff in the Writ of Error, that the Writ did lye, because although the Action in the former Judgement was but a personal Action, yet in this Case, the Land of the Heir may be charged by the Judgement, for an elegit may be thereupon taken out to charge his Lands, and therefore the Judgement concerns him as Heir as well as Executor, and therefore it is reason he should bring a Writ of Error to reverse the Judgement, because he may be prejudiced by it. And a Case in Trin. 29 Eliz. rot. 631. Banc. Reg. was cited, that the Heir is privy to the Judgement, and therefore shall have a Writ of Error, and he is not meerly terr-Tenant 13 E. 4. 2. Roll Iustice, the terr-Tenant sole shall not have a Writ of Error upon an extent; And in the Case at the barr the Heir is not privy to the Judgement, and the extent is only upon him as terr-Tenant, and he is not made privy to the Judgement by the extent, but after Execution he may have a Writ of Error, and he said, the Bail cannot bring a Writ of Error upon the Judgement given against the Principal, and the same reason is here, and it will be very hard to maintain this Writ of Error. Adjourned to the next term.

Heir. Elegit. Executor. Error. Error. Bail.

Terry and Baxter.

Trin. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 394.

TErry brings an Action of Debt upon an Assumpsit against Baxter, to stand to an Award. The Defendant pleads nul arbitrement; the Plaintiff sets forth the award, and assigns a breach; The Defendant demurs, and for cause shews that part of the award was to pay 5 l. to the poor of the Parish of D. which was not within the submission, and so the award was not good. Rolle Iustice answered, if the award be void to the 5 l. awarded to be paid to the poor, yet it is good to the rest, for it is perfect as to the ending of all differences between them which are submitted, and therefore shew cause on Monday next, why judgement should not be given for the Plaintiff.

Demurrer upon an Declaration in Assumpsit to stand to an award. Award good in part is a good award.

Morefield and VVebb.

Trin. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 50.

VVEbb brings an Action upon the Case against Morefield in the palace Court at Westminster, and hath a Judgement; Morefield brings a Writ of Error in this Court to reverse the Judgment, and Assigns these Errors. 1. It is not shewed in the Declaration that the cause of Action was infra jurisdictionem palatii. But Rolle Iustice answered, that it

Error to reverse a Judgement in an Action upon the Case. Iurisdiction.

Return. it was shewed to be infra jurisdictionem Curiæ, and that was good enough, for the Court is alleged to be held by Letters patents. A 2d. Exception was, that there was not fifteen dayes for the return of the Venire facias as there ought to be; But to this Rolle Iustice also answered, that the Court is held by Letters patents, and therefore it may be returnable within fifteen dayes, though by the usual course of the Common law it cannot. And therefore ordered the Plaintiff in the Writ of Error to shew better matter, otherwise Iudgement should be affirmed against him.

The King and Holland.

Trin. 23 Car. Banc. Reg.

For quashing an inquisition for the King. Inquisition. THe Case between the King and Holland was moved again, and the Councell against the King, moved that the inquisition found for the King to entitle him to the use of the Copyhold might be quashed, because the King cannot be intitled to such a use, because it is a thing in privity only, and cited the Statute of 27 H. 8. of uses, and Cooks 1. rep. 123, and said, that the King cannot be intitled to Copyhold lands of an Alien much lesse to the use of Copyhold lands; if he should, 1. The Lord would be wronged, which the King ought not to do, but to protect his subjects, for the protection of the subject, is not only matter of honour to the King, but also of trust in the Crown; 2ly. A stranger is wronged by it; 3ly. The Copyholder of the Manor cannot have remedy for the injury done him, for he ought to sue in the Lords Court, and not else where, and here he cannot do it, and the rule in law is de minimis non curat lex, and it is much lesse for the honnour of the King to have a Copyhold estate, which is a base tenure. But it may be objected, that if the King shall not have this use, he shall be in a worse condition than a subject. To this it is answered, that he shall be so in cases which touch his royalty, and may be a disparagement to him, which indeed doth not make him in a worse condition though it may seem so, but it is more for his honor, and a Copyhold is an estate at the will of the Lord, and ought to be protected by the Lord; and the King cannot be Tenant at will to any, and therefore cannot have a Copyhold estate; and an Alien is not capable of a trust, because it is a thing in Action which an Alien cannot have, and therefore he cannot derive it from him. Twisden for the King in his Argument considered, 1. Whether the King can have a use at the Common law which is for an Alien. 2. Whether a trust differs from a use; for the first he said, that an Alien may purchase lands, and a use at the Common law, but he cannot retain them, therefore the King shall have them by his Prærogative, and a use is not a thing in privity, but is an Antient inheritance at the Common law. 2ly. There is no confidence annexed to cestui que use, or to the Feoffor, but may be disposed of. 3ly. Things in privity in Action may be given to the King, and a use is an inheritance in the nature of a Chattell. 4ly. A use is grantable over, and therefore may be given to the King, and the meaning of the word lost, in the Statute, is to be intended that it may be lost for the difficulty of finding such subtile conveyances, and not that the right was really lost. And for a trust it is but a new name given to a use, and invented to Defraud the Statute of uses, and a trust of a Copyhold is all one with another trust, for it is the taking of the profits of the land, and not the Estate in the land, and the King shall have it; And to that which is said that

Copyhold. King. Wrong. Protection. Trust. Sute. Honour. Copyhold. Alien. Trust. Alien. Prærogative. Privity. Trust.

that the King cannot be a Copyholder, it is not so clear; for I conceive the contrary: for a surrender of a Copyhold to him is good, and of a use too: and he cited these books, 9 H. 6. fol. 25. 20 E. 3. f. 3. 11. rep. 91. Rolle Iustice said, that a Trustee or cestuy que trust cannot take the profits of the land, but hath only his remedy in equity, for the Estate in the land is only in the party trusted; and the King shall not have the profits of the land upon an Outlawry against the cestuy que use, or cestuy que trust. And Law and Equity ought not to be confounded; therefore if the King hath equity for a thing, he ought not to sue for it at the Common law, so is it in this case at the bar. Adjourned.

Cestuy que trust. Equity. Outlawry. Law & Equity.

Chapel and Drew.

23 Car. Banc. Reg.

Hill. 21 Car. rot. 921.

IN this case the party being attainted of felony, pleaded his Charter of Pardon and Claims, thereby to be restored to his Goods and Chattels forfeited to the King by the felony; and the Question was, whether as the Pardon was penned he should be restored or no? the words of the Pardon upon which the Question grew, were these, pardonavit, remisit, & relaxavit, and it was held, that he was not by these words to be restored to his Goods and Chattels; for the words do not amount to a Surrender in case of a common person, much less in case of the King, and there ought to have been the word restituit. Roll Iustice said, this Pardon was drawn by Noy, Attorny General, and was too short, and it was said by him that if one be committed to the Gaol for one felony, the Iustices may enquire and try the party for another felony for which he was not committed.

Exception to a pardon for Felony. Pardon.

Felony. Tryal.

Tylers Case.

Trin. 23 Car. Banc. Reg.

AN action of Debt was brought against Tyler upon an Obligation to stand to an Award, and the Plaintiff declares of an Arbitrement made the 28th. day of May in such a year, ready to be delivered up the nine and twentyeth day of May in the same year; The Defendant pleads nullum Arbitrium, The Plaintiff replies, that the Award was made by the Umpire the 28th. of May ready to be delivered up upon the same 28th. day of May, and to this replication the Defendant demurs, and shews for cause, that the Plaintiff had set forth double matter, one in his Declaration, and the other in his Replication; for the Award set forth in the Declaration, and that set forth in the Replication cannot be intended to be one and the same. But Roll Iustice answered, that the Issue to be tryed, is not to be taken upon the day of the Award made, and therefore it requires no answer, and so cannot be double, and one ought not to demur for the doubleness of the matter upon a thing upon which no Issue can be taken, and ruled better matter should be shewn, or else Iudgement should be given for the Plaintiff.

Demurrer to a Replication

Demurrer.

Eſtwick and the City of London.

Trin. 23 Car. Banc. Reg.

Mich. 35.

Argument in the Caſe of the VVrit of Reſtitution to a Common-Councel-mans place.

THe Caſe of Eſtwick and the City of London was again argued by Serjeant Glynn for the City; in his Argument he inſiſted upon three particulars why Eſtwick could not be reſtored to his place of a common-Councel-man. 1. That a common-Councel-man may be removed or ſuſpended from his place at pleaſure by the cuſtome of the City. 2ly. That he cannot be reſtored by Law. 3ly. No reſtitution can be in this caſe as it now ſtands. Firſt, the cuſtom to remove a common-Councel-man is good, for it firſt began by agreement, and ſuch a cuſtome is good at the common law, much more here, and it is not an unreaſonable cuſtome, although it may ſeem ſo prima facie, like as it is in the caſe of a Lord that ſeiſeth the Lands of his Villein, and in the caſe of a Coppyholder that forfeiteth his Eſtate by the felling of Timber. A ſecond reaſon is, it agrees well with the nature and condition of the office of a common-Councel-man to be ſubject to this Cuſtome, and we know that many things ſhall be tryed by Cuſtome, contrary to the courſe of the common law. 3ly. We ſee that the order of the Parliament is a rule to try matters concerning their Members, and ſo it is here in the Citie to try their Members. 4ly. If it ſhould not be ſo, it would prove deſtructive to the City, by waiting till ſuch an offender might be removed by a courſe in Law, which is far more tedious than this cuſtomary way. To the ſecond point, he ſaid, that by Law there can be no reſtitution to this office, and this is proved by the very nature of the Writ of Reſtitution, which is to reſtore the party to a freehold or ſome other matter of profit, neither of which can be in our caſe, and a writ of Reſtitution is to reſtore one to a poſſeſſion, where one may not be reſtored by an ordinary way, neither doth the Statute of Magna charta extend to our caſe: for a common-Councel-mans place is merely grounded upon the cuſtome of the City, and not upon the Common law. and he ſaid there are three grounds for a Writ of Reſtitution. 1. A contempt to the King. 2ly. A hurt to the Common-wealth. 3ly. Particular dammage to the party; but none of theſe is in our caſe, and therefore there is no cauſe for a Writ of Reſtitution. The caſe of Sir Iames Baggs having a Writ of Reſtitution was, becauſe he was deprived of his Trade and Freedom, a free-hold, and our caſe differs from the caſe of a Conſtable, or a Church warden, or any caſe that can be cited; for a Church warden is an officer in relation to the Common wealth for the execution of Juſtice, whereof the Common law takes notice, and likewiſe a Conſtable is a known Officer to miniſter Juſtice in relation to the publique: ſo is it of a Recorder of a Corporation, and ſo they all differ from our caſe. For authority to this point in 17 Iac. but moved firſt 16 Iac. Warren a common-Councel-man of Coventry was denyed upon the return of his Writ to be reſtored, and our caſe and return is more ſtrong againſt the Plaintiff; and Burman a Gentleman of one of the Inns of Court, being expelled, could not be reſtored by a Writ of Reſtitution, and lately a common-Councel-man was removed for not taking the Proteſtation. For the third point, whether upon the Writ it ſelf, as this caſe is, there can be any reſtitution made? I conceive not, becauſe it is directed to the Maior and Commonalty, and Citizens of the City of London, and ſo there is in it a falſe recital of the ſuſpenſion; for he was not removed by the Citizens, and ſo the Writ is directed to parties who did not the

Tryal.

Conſtable. Church warden.

Recorder.

Recital.

the wrong, and so it is ill directed, and it differs from the direction of the Writ in Sir Iames Bags case, and it ought to have been directed to the Sheriffs or Ministers who have authority to restore him, as they did remove him, for the party that hath done no wrong ought not to be punished or molested; and for the ill direction of the Writ could not Warren the common-Councel-man of Coventry be restored, and the Corporation of London is responsable for all particuler Misdemeanours done within any Courts of Iustice within the City, or other general Misdemeanours there committed. Misdemeanours.
Maynard on the other side argued, that the case was mistaken as it is stated in the Return, for it supposeth that the party is removed at pleasure, and yet supposeth also, that there is a cause to remove him, to wit his refusing to go out, and expresseth not that he did not go out, nor that he was commanded to go out, but that he was requested. And whereas it is said a common-Councel-mans place is no more but to advise, here is more than to advise, for he hath a privilege for his own good, and the good of the City. 3ly. The Writ is well directed, and cannot be otherwise for the party to have remedy, and all the Presidents are as this is, and Alderman Harris his case is the same in point with this, where it was by three Judges resolved, that he should be restored to his Aldermans place, because it was a place of Honour as well as of Burthen. Roll Iustice said, 1. That the Writ was well directed. 2ly. That the custom was ill recited. 3ly. If it were well recited, yet it is a void custom. 4ly. The Return is not good, for the incertainties of it, viz. in the causes shewed, why the party was removed, and therefore that he ought to be restored to his place. Bacon Iustice to the same intent, and said, that whersoever a Commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to Law, and that this Court hath power to redress things otherwise done by them. The rule was, that the party be restored, if better matter be not shewn Tuesday following. Presidents. Discretion. Iurisdiction.

Trin. 23 Car. Banc. Reg.

IN an Action of Trespass for digging in his Ground, and carrying away 200 load of soyl, It was moved in arrest of Iudgement, that it should have been of soyl inde provenient. and that an intendment cannot make it good. Roll Iustice said, it seems a good Exception, for as it is it is too generallie laid. Arrest of Iudgement in Trespass.

Vincent and Fursy.

Trin. 23 Car. Banc. Reg.

Hil. 22 Car. Rot. Q.

VIncent brought an Action of Trespass against Fursy for breaking open 2 Chests, and taking away certain Cloaths, and 3 l. in mony, and had Arrest of Iudgement in Trespass.

a Verdict for him. The Defendant moves in Arrest of Judgement, and takes these exceptions. 1. That the Declaration is too general, for it sets not forth what the cloths were which were taken away, and so the value of them cannot be known as it ought to be, that Damages may be rightly given. 2. In this one Declaration there is an Action of Trespasse, joyned with an Action upon the Case, viz. the Trespasse for breaking open the Chests, and the Action of the Case for taking away the cloathes, and mony, which ought not to be, for two several Actions ought not to be laid in one Declaration. Wadham Windham of Councell with the Plaintiff said it was well enough, and could not be otherwise, and the thing is certainly enough set forth, and shall be interpreted reddendo singula singulis, viz. the spoliavit in the Declaration shall have reference to the cloaths, and the cepit to the mony. Rolle Iustice said, that an Action of Trover, and Conversion for divers sorts of linnen had been adjudged good. and 29 E. 3. An Action of Trespasse lyes for beating of his servant, and in Clecheroes case, an Action of Trespasse was held good for rescuing a prisoner from him whom he had Arrested, and the Cook of Grayes Inn brought an Action of Trespasse for taking away his wife, per quod consortium amisit, and it was held to be well brought, but if the cloaths in the case at the bar had not been in the chest, the Action would not have lain; and he took another exception, namely that the Declaration was for the breaking of 2 chests, and so it appears not where the cloaths were when they were taken, whether in one or in both of them. The rule was to stay Iudgement till they had seen the Record.

Trover and Conversion.

Trespasse.

Incertainty.

Capell and Allen.

Trin. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 639.

Demurrer upon an award.

Award.

Submission.

CApell brought an Action Debt upon an Assumpsit to stand to an award, the Defendant pleaded Nul Arbitrement, the Plaintiff replyes, and sets forth the Arbitrement, and the breach, the Defendant demurs, and for cause shews that the award was not good, because it was made but of one part, for it was, that one of the parties should do such things expressed, and that the other party should pay for the making the Bonds of Submission, which cannot be awarded, and so nothing is awarded for him to do, and the Arbitrators cannot award this, because it is not within the submission. Rolle Iustice held this a good exception, and said the Charge for making the writings is not within the Submission, for the bonds were made before the Submission, and it was held 13 Jac. that the words super præmissis in the award will not help an award made but of one part.

Trin.

Trin. 23 Car. Banc. Reg.

AN Action of Debt was brought upon a Bond, to perform the Covenants of an Indenture of a Demise for years. The Plaintiff declares that he made the Lease to the Defendant the 28. day of May, and that afterwards scilicet the 27, of the same Month of May, the Defendant broke the Covenant. To this Declaration the Defendant did demurr, because it appears that the breach is set forth to be before the lease began, which could not be, and so there is no cause of Action. But to this Bacon Iustice said, where the postea and the scilicet are repugnant in a deed, as here they are, the postea shall be good to signifie the time of the Covenant broken, and the scilicet shall be void. Therefore shew cause why the Plaintiff should not have Iudgement. Nota.

Demurrer to a Declaration in Debt upon a bond to perform Covenants of an Indenture. Breach. Interpretations.

Trin. 23 Car. Banc. Reg.

A Prohibition was prayed to the Corporation of Lincoln upon a suggestion made, and sworn in this Court, that the cause of Action if any were arose in the body of the County of Lincoln, and not within the jurisdiction of the City of Lincoln. Hales on the other side said, they had admitted the jurisdiction of the Court in that they had not pleaded to it. But Roll Iustice said, inferiour Courts are limitted in their jurisdictions, and ought to be kept in order by prohibitions if they exceed, and if they proceed in matters not within their jurisdiction their proceedings are void. Adjourned to the next Term.

For a prohibition to the corporation of Lincoln. Admission. Iurisdiction. Prohibition. Proceedings.

Trin. 23 Car. Banc. Reg.

THe Court was moved for a Prohibition to an inferior Court, but on the contrary part it was said, that they moved too late, for they had admitted the jurisdiction of the Court by pleading, and cited 9 H. 7. 12. and Fitz. jurisdict. 19. Bacon Iustice said, it is here in a Court of Common Law, and not in the spiritual Court or Admiralty, and therefore a Prohibition may be here granted notwithstanding the pleading there, but had it been the spiritual Court or the Admiralty, it had been otherwise. But Rolle Iustice said, it was all one in the spiritual Court, or Admiralty as it is in this case, if they exceed their jurisdiction. Yet it is mischievous to grant a prohibition in this case, for thereby many Iudgements will be stopped. Therefore the Court would advise to the next Term, but stayed nothing.

For a prohibition to an inferior Court. Admission. Prohibition. Iurisdiction.

Trin.

Trin. 23 Car. Banc Reg.

For the undersheriff to return a Jury. Return. Surmise. Petigree. Attorney.

THe Court was moved that the undersheriff might return a Jury, because the Sheriff, and Coroner were of kinn to the Plaintiff, the Court thereupon demanded whether they had brought in the surmise, and proved the petigree, to which they answered, They had, thereupon they were bid to name some Attorneys of the Country, which was done, and thereupon a rule made that they should return the Jury. Nota.

Trin. 23. Car. Banc Reg.

To stay proceedings at the Court at Maydston. Supersedeas

Writs. Rules.

THe Court was moved for a rule to stay proceedings in the Court at Maidston in Kent, because a supersedeas could not be granted, for that nothing erroneous issued out of this Court. But the Court answered, that a supersedeas might well be granted, and so said Hodsden the Secondary, although nothing erroneous be issuing out of this Court, and Bacon Justice said that the Writs of the Court are as good, and of as much force as the rules of Court, and therefore we will make no rule to stay their proceedings, but you shall have a supersedeas if you will.

Person and Dawson.

Mich. 23 Car. Banc. Reg.

Arrest of Judgment in an Act on for words

Case. VVords.

AN Action of the Case was brought by Person against Dawson for these words, your Son innuendo your Son William, stole a horse, and soldhim for ten pounds; The Plaintiff hath a Verdict, the Defendant moved in Arrest of Judgement that the words are not actionable, because uncertain, and the innuendo cannot help them; and the Judgement was stayed till the other should move. It was afterwards moved again, and the Judgement stayed, and this Term Judgement given for the Plaintiff.

Mich. 23. Car. Banc. Reg.

To quash an Endictment upon the Statute of usury. Pursuance.

THe Court was moved to quash an Endictment upon the Statute of usury. The exception taken was, that it is not said corrupte agreavit nec accepit, and so the Statute is not pursued; Roll Justice said, that it is the corrupt receiving, and the corrupt contract, upon which Endictments are framed upon the old Statute, viz. 3. Jac. &c. but if the Endictment be framed upon the Statute of 21 Jac. there it ought to be upon the corrupt contract, and because this Endictment is framed upon the Statute of 21 Jac. and mentions not the corrupt contract, it is not good, and therefore let it be quashed.

Yates

Yates against Lyndon.

Mich. 23 Car. Banc. Reg.

MAry Yates brought an Action upon the Case for speaking these words of her, Mary Yates is a Sorcerer, and a Witch, and a white Witch, she can witch and unwitch! and hath a Verdict. The Defendant moved in Arrest of Judgement that the words are not actionable, because the Plaintiff is not by the speaking of them brought within the Statute of 21. Jac. against Witch-craft: But Roll Iustice doubted, whether the word Sorcerer did not bring the Plaintiff within the Statute. Yet Judgement was stayed till the Plaintiff should move. Hill. the same year it was moved again, and the Court adjudged Nil capiat per billam, for they held the words not actionable. Arrest of judgment in an Act on for words. Case. Statute. Witchcraft.

Turner and his Wife.

Mich. 23 Car. Banc. Reg.

TUrner and his Wife brought an Action upon the Case for these words, spoken of the Wife, she is a Witch, and I will take my oath of it; The Plaintiffs had a Verdict: The Defendant moves in Arrest of Judgement that the words were not actionable; for to say one is a Witch, and to say no more, is not actionable, and the last words, I will take my oath of it, do not enlarge the former words. The Court arrested Iudgement till the Plaintiff should move. Arrest of Judgement in an Action for words. Words.

Paradine and Jane.

Mich. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1178.

PAradine brought an Action of Debt for rent due for lands, let for years unto Iane the Defendant, and declares particularly how much rent was due, and for what time. The Defendant pleads a special Plea to this effect; as to part of the rent for which the Action is brought, he confesseth the Action: As to the rest he pleads, that Prince Rupert an Alien, and an Enemy of the King invaded the land with an Army, and with divers armed men did enter upon him, and did drive away his Cattell, and expelled him from the lands let unto him by the Plaintiff, and kept him out that he could not enjoy the lands for such a time; and demands judgement if for the rent incurred during that time the Plaintiff ought to have his Action? To this Plea the Plaintiff demurrs, and for cause saith, that it is neither good in matter nor form. The 1. question was, whether a Lessee for years ousted by an Army of Aliens, can plead it in Barr, in an Action of Debt brought for rent due upon the Lease? And to this it was said, that this is an Action of Debt, and lyes meerly upon the contract between the partyes, and so this collaterall matter pleaded is nothing to the purpose, but had it been an Action of Wast, if the Wast had been done by Pr. Rupert, and his Soldiers, it may be it might have been pleaded to bar the Plaintiff, 19. E. 2. Brook Cove- Argument in Debt for rent upon a lease for years. Demurrer. Plea. Debt. contract. Vi. et.

Alien. Enemy. Covenant 4. was cited. Next the Plea doth not say, that the Armed men with Prince Rupert were Aliens or Enemies of the King, but only that Prince Rupert was so. But to this exception Roll Iustice answered, that they shall be so intended if they be his Army with which he invaded the Land. Another exception was taken, that the Plea gives no answer at all for one Quarters rent demanded, which incurred after the time that he was kept out by Prince Rupert. The Counsel for the Defendant in defence of the Plea, urged that it was not necessary to aver, that the Army with Prince Rupert were Aliens, and cited 3 H. 6. 61. and the Counsel took a difference between an Enemy and a Rebel; and though in the case of a Rebellion this might not be a good Plea, yet in case of an Invasion he conceived it was, because he could have no remedy against the party, and resembled this case to cases of like nature cited out of 9 E. 3. 7. 40 E. 3 6. & 33 H. 6. 1. and said, that where waste is done in the Lands let for years by one, again whom the Lessee can have no remedy over, there the Lessee for years is not chargeable for the waste, except he be bound by a particular Covenant to keep the Lands let without waste. Also by the Law of Reason it seems the Defendant in our case ought not to be charged with the rent, because he could not enjoy that that was let to him, and it was no fault of his own that he could not, and the Civil law, and Canon-law, and Moral Authors do confirm this, and Dyer 56. & 11 Ass. 13. were cited; and it was said, there is no difference between an inundation and this invasion, and had the Lands been surrounded by water, the Lessee should not have been chargeable for the rent during that time, neither as I conceive shall he be here. Next consider the nature of the reservation, 10. Rep. 128. A rent is not to be paid untill it may be intended that the Lessee might have received the profit of the thing for which the rent is to be paid, 27 E. 3. 81. 8 H. 4. 6. Fitzh. Execution 146. 9 E. 3. 16. neither by the Martial law is the Defendant chargeable, and that Law is the Law of Nature as well as of Nations. But Roll Iustice answered, that the Plea was not good, for he hath not pleaded that the Army were Aliens and unknown, as he ought to have done, and the pleading that it was hostilis exercitus, makes not the Plea more certain than before, and if the Tenant for years covenant to pay rent, though the Lands let him be surrounded with water, yet he is chargeable with the rent, much more here. Therefore let the Plaintiff take his Judgement.

Civil law. Canon. Moral. Inundation. Rent. Payment. Martial Law. Law of Nature. Covenant.

Rebel. Remedy. Waste.

Plea.

Fremling and Clutherbook.

Mich. 23 Car. Banc. Reg.

Arrest of Judgment in Trover and Conversion.

FRemling and his Wife, Executrix of A. B. bring an Action of Trover and Conversion against Clutherbook, for Goods of the Testators found, and converted by the Defendant, and obtained a verdict against him. The Defendant moved in arrest of Judgement, and took these Exceptions. 1. That the Declaration was of a joynt possession of Goods of the Husband and Wife, and dammages are given to the Husband and Wife, whereas the Goods properly belong to the Wife only as an Executrix, and not to the Husband and Wife. 2ly. It doth not set forth how the Feme came to the possession of the Goods. But to this Roll Iustice answered, that the possession of the Wife, as Executrix, was also the possession of her Husband, and that the dammages recovered shall be to the estate of the Testatour, and so may concern them both. And for the second exception, this being a possessary

Possession. Dammages.

sary Action only, it is not necessary to shew how the possession of the Goods was gained. Stayed till the other should move.

Parmiter and Cressy.

Mich. 23 Car. Banc. Reg.

PArmiter brings an Action upon the case upon an Assumpsit, and declares, that the Defendant in consideration that the Plaintiff had sold and delivered unto him such a number of pieces of Stuffs, the Defendant did assume and promise to the Plaintiff to deliver unto him the value of the Stuffs in such Pipes of Wine, lying in Bradgates Cellar in London as the Plaintiff should make choise of; and for not performing the same brings this Action. The Plaintiff obtains a verdict. The Defendant moves in arrest of Judgement and shews these causes. 1. That the Plaintiff doth not aver in his Declaration, that he made any election of the Pipes of Wine, and before such election the Defendant was not bound to deliver them, nay it was impossible for him to perform the agreement before the election. 2ly. The Plaintiff doth not set forth, that he made his election where the Wine was, which he ought to have done, because of the insupportableness of the commodity to be brought to him to make his choice. The Court held, that here ought to be a special request made to deliver the Wines, because it is upon a Contract, and an Action of Debt lies not for them, and thereupon arrested the Judgement till the Plaintiff should move. The same Term Judgement was given against the Plaintiff. Quod nil capiat per billam.

Arest of Judgment in an Indebitatus Assumpsit.

Averment.

Election.

Request special.

Mich. 23 Car. Banc. Reg.

THe Plaintiff brings an Action of the Case against the Defendant, for speaking these words against him being a Minister, He is an Adulterer, Whoremaster, Drunkard, a common Swearer, and a Preacher of false Doctrine. The Plaintiff hath a Verdict. The Defendant moved in arrest of Judgement that the words were not actionable, because the matter expressed by them is merely Ecclesiastical, and not tryable at the Common law; and it was said, that a man may preach false Doctrine, and not be punished for it, if he be not a benefited man, and it doth not appear here, that the Plaintiff had any living, and besides, it is not said he was a Preacher of heretical Doctrine, but of false Doctrine, which words are more ambiguous. The judgement was stayed till the Plaintiff should move.

Arest of Judgment in an action upon the Case for words.

Words.

Tryal.

False Doctrin.

Heresie.

Mack and Cubitt.

Mich. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. Q.

MAck brought an Action upon the case against Cubitt for speaking these words of him, You are a branded Rogue, and have held up your hand

Arest of Judgment in an action upon the Case for words.

VVords. hand at the Bar, and deserve to be hanged, and shall be hanged. The Plaintiff hath a Verdict. The Defendant moves in arrest of Judgement that the words were not actionable, for they are all but words of Infamy and disgrace, and not of dammage to the Plaintiff. But it was said, that it had been adjudged that an Action did lye for saying one had been endicted of Barratry, where the party that was endicted was acquitted, and for saying one was a Banckrupt Rogue. But because Panel of Councel with the Defendant said, he could shew Presidents that the words are not actionable, the Court forbore to give Judgement, but desired to see them, and gave him time to bring them in another day. Panel cited two Presidents, but no Judgement in either. Whereupon Judgement was given for the Plaintiff.

Presidents.

Blackwell and Ashton.

Trin. 23 Car. Banc. Reg.

Demurrer to a Scire facias upon a Judgement. Demurrer. Abatement. FOwer several persons were bound conjuctim and divisim in an Obligation to Blackwell, Blackwell hath a Judgment against them, one of the Defendants dies, Blackwell sues out a Scire facias against the 4. and it was demurred to the Scire facias, because one of the Defendants against whom the Judgement upon which the Scire facias was granted, was dead when the Scire facias issued forth. In this case it was said, if two be bound joyntly in an Obligation, and an Action be brought against one of them only, upon this Obligation the Defendant cannot demur, but may plead in Abatement of the Writ. And if two be bound joyntly in an Obligation, and one of them dye, and the Obligee brings an Action of Debt against the other that survives, he must in his Declaration set forth that the other is dead. The Plaintiff in the case at the Bar, perceiving the inclination of the Court to be that the Scire facias was not good, moved for his own expedition to have it quashed, which was granted.

Scire facias.

Lodg and Weeden.

Mich. 23 Car. Banc. Reg.

Arest of Judgment in an action upon the Case. THe Plaintiff brings his Action upon the Case against the Defendant, and declares, that the Defendant had killed divers infected Cattel, and had thrown out the inwards or offall of those Cattel upon the Close of the Plaintiff, whereby divers of the Plaintiffs Cattel were infected with the murrain, and did dye thereof, and shews how many, and declares to his dammage so much, and hath a verdict against the Defendant. The Defendant moved in arrest of Judgement, and offers these exceptions, 1. The Declaration is, that the Plaintiffs Cattel were infected morbo mortali, Anglice with the murrain, whereas there is a proper Latin word to express the Murrain, namely Lues, which ought to have been used, and not to be expressed by such uncertain words as morbus mortalis is, which signifies only a mortal disease, and so might be any other Disease as well as that. 2ly. The Declaration says that the Defendant did cast interioria, Anglice the inwards or offall of the Cattel, whereas that is not the proper Latin word for

VVords.

for them, but Inteſtina. 3ly. The Declaration doth not ſet forth what Cattel they were, nor how many they were, that the Defendant had killed, and thrown their inwards or offall on the Plaintiffs Cloſe. But the Court over-ruled all the exceptions, and ordered the Defendant to ſhew better cauſe why the Plaintiff ſhould not have judgement.

Rawſon and Bargue.

Trin. 23 Car. Banc. Reg. Vid. antea.

The caſe between Rawſon and Bargue upon the ſpecial Verdict found in an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, wherein the Queſtion was whether the Chapel was a free Chapel, and given by the Statute of 2 Ed. 6. to the King or no, was moved again, and argued by Maynard that it was a free Chapel given to Edward the 6th. by the Statute, and ſaid, the firſt reaſon was taken from the words of the Statute. A ſecond reaſon from the preamble of the Statute. A third from the reaſon of the Statute. And a fourth from the meaning of the Statute. Firſt the intent of the Statute was to change Chapels of ſuperſtition to pious uſes, and doth intend reformation, and not to take away the Chapels themſelves, and for this cauſe it being for ſo great a good, the Statute ſhall be generally interpreted, 11 Rep. f. 17. and the words All mannour in the Statute, &c. do more oppoſe a diſtinction than the word all can do, for they are more emphatically uſed. 2ly Though it be parochial and with cure of Souls, yet it is not exempted out of the Statute, and this Statute differs from the Statute of 37 H. 8. And in caſe of free Chapels, all are veſted in the King (be they ſuperſtitious or not) by the Statute. 3ly. It is not within the exceptions in the Statute, and therefore is within the Statute, and he took this difference, that Donors of Churches are, where Churches are donative; and Patrons of Churches are, where they are preſentative. 2ly. The proof of the contemporary expoſition of the Statute is here to be conſidered. 6 H. 7. 14. Free Chapels are of two ſorts, 7 Ed. 3. 18. 17 Ed. 3. 12. Cooks Lit. 144. A Free Chapel may be preſentative, and a Pariſh-Church donative, and they are ſo according to the foundation of them at the firſt. A Pariſh-Church cannot be a Free-Chapel, but a Free-Chapel may be a Pariſh-Church, 47 E. 3. 5. 9 E. 3. f. 10. 30 Ed. 3. and a Church is not a Church if it have not Baptiſm, and Burial belonging unto it, Bract. lib. 3. C. 4. 17 E. 3. 5 E. 3. A Chapel may be within a Church, and a Church within a Chapel; and Capella is derived by Rhenanus the Civilian, from a Cap or Covering, and ſo is to be accompted more ſuperſtitious than Churches are, becauſe their very name ſhews their derivation to be ſuperſtitious. Twiſden argued on the contrary, that it was not within the Statute of 2 Ed. 6. nor given thereby to the King: and that it is not a Free-Chapel, neither by the words, nor within the intent of the Statute. 2ly. If it be a Free-Chapel, yet it is preſentative, and within the juriſdiction of the Ordinary. and ſo not a Free-Chapel: for it hath no immunity either in regard of Juriſdiction or otherwiſe, and cited Cooks Littleton, f. 94. The Chapels of the King are all Free-Chapels, becauſe they they are exempt from all Juriſdiction of the Ordinary, Regiſter, 40, 41. Thre are two ſorts of Chapels, to wit, Free-donatives, 6 H. 7. f. 19. 2ly. Preſentatives. Nat. Br. 35. A Chapel may be preſentative by the foundation of it, or by matter ex poſt facto, 22 H. 6. f. 26. A ſecond reaſon to prove it to be preſentative may be from the finding of the Jury who

Arguments whether a Free Chapel or not within the Statute of 2 Ed. 6.

Statute. Free Chapel.

Veſting.

Difference.

Diviſion. Donative.

Pariſh-Church.

Derivation.

Matter ex poſt facto. Preſentation.

have found it so, and the calling of it otherwayes is to no purpose to alter it, Dyer 81. Nort if it be a free Chapel it is presentative, 11. rep. 150. Cowel tit. free Chapel, Lynwood 149, 150. Grendous Case 4. rep. Institution gives cure of soules, 13 E. 4. f. 4. There may be a benefice with cure not presentative, and if it be with cure then it was not for a superstitious use, and cannot then be within the intent of the Statute, 1. rep. 23. And for the word all, it is not alwayes taken generally, but restrictively. 2 H. 6. To the objection made to the Verdict, that it is not found by whom it is presentative, I answer: This is a special verdict, and it is the expression of the lay gens, and shall be interpreted according to common acceptation. The rule of Court was, to argue it again the Next Term, because it is a cause of great consequence.

Institution. Cure of souls. VVords. Special verdict.

Mich. 23 Car. Banc. Reg.

Arrest of Judgement in assault and battery joyning in an Action.

BAron and Feme bring an Action of Trespass of Assault and Battery, and declare of an assaulting, and beating of the Feme, and have a verdict; the Defendant moves in arrest of Judgement, and for cause shews that the Baron and Feme ought not to joyn in this Action, though the Assault and Battery was done to the Feme particularly, but that the Baron ought to have brought the Action alone, because what ever damages should be recovered would go to the Baron only, and cited 9 E. 4. fol. 51. The Judgement was arrested till the Plaintiff should move.

Vandicoote.

Mich. 23 Car. Banc. Reg.

Arrest of Judgement in Debt for rent against an Executor. Debt in the detinet and debet. Executors. VVaiver.

THe Plaintiff brings an Action of Debt against Vandicoote, the Executor of I. D. for rent due unto him by the Testator in his life time, and hath a verdict. The Defendant moves in arrest of Judgement, and for cause shews that the Plaintiff had declared that the Defendant detinet et debet which ought not to be, but in the detinet only, the Action being brought against him as an Executor for rent due in the Testators life, and cited Smith and Nichols case 7 Car. But Wild of Councell with the Plaintiff said, it was good enough in the detinet and debet, though it might have been in the Detinet only: Hales on the contrary part said it was not good, for it could not be the Debt of the Executor, though he be to be charged, and so he cannot be said debere, but it is the proper debt of the Testator, and the Executor may be said detinere because he ought to pay it, and doth not. Roll Iustice said, that it had been adiudged good both wayes, and said, that Executors cannot waive a Term come to them, and yet they cannot be charged in the debet and detinet. And prima facie in the case at the bar, the Action may be brought in the debet and detinet. Yet put the cause in the paper, and argue it again.

Tanner

Tanner and Laurence.

Mich. 23 Car. Banc. Reg.

TAnner brings an Action upon the Case against Lawrence, upon an indebitatus Assumpsit to pay unto him two shillings a piece for every cloath he should buy for the Defendant, and declares for so much money due unto him, and hath a verdict; the Defendant moves in arrest of Judgement, and shews for cause, 1. That it is not averred by the Plaintiff, that he gave any notice to the Defendant how many cloaths he had bought for him, and so it is not certain what is due to him. To this it was answered, that the cloaths were bought for the Defendant himself, and he may very well take notice of the number of them, without any notice given him. A second answer was, that here is a request set forth for the payment of the mony, and this implyes a notice. But Roll Iustice to this answer replyed, that the request doth not imply a notice, and so is Twists Case, and besides the notice ought not to be by implication, but must be averred certainly. Yet let it be moved again.

Arrest of Iudgement in an indebitatus assumpsit.

Averment.

Notice.

Implication.

Mich. 23 Car. Banc. Reg.

THe Plaintiff in an Action upon the Case upon an indebitatus declares that the Defendant in consideration of a certain sum of mony, due to the Plaintiff by the Defendant, for rent behind upon a lease for years, did assume, and promise to pay the same unto him at a certain day, and had not done it, and for this he brings his Action, and hath a verdict, the Defendant moved in arrest of Judgement, and for cause shews that there is no consideration declared to ground an Action of the Case upon, for rent is a reall thing, and an Action of Debt ought to have been brought for it, and not this Action. Roll Iustice said, that here is only a consideration in law set forth, which is not good to warrant this Action: But it may be there was some new consideration that sprung from the being of the rent behind that did ground this Action, but no such thing doth appear in the Declaration. Therefore the Plaintiff nil capiat per billam, if cause be not shewn within 14 dayes why he should have his Iudgement.

Arrest of Iudgement in an indebitatus assumpsit.

Consideration

Debt.

Wood and Salter.

Mich. 23 Car. Banc. Reg.

IN an arrest of Judgement in an Action of Trespasse for carrying away 24 load of tymber, The exception was, that the Tymber is not said to be the Tymber ipsius querentis, and so no cause of Action. Vpon this Iudgement was arrested.

Arrest of Iudgement in Trespasse.

Burnet and Bird.

Mich: 23 Car. Banc. Reg.

Arreſt of Iudgement in an Action upon the Caſe upon a promiſe.

BUrnet the Adminiſtrator of I. S. brings an Action upon the Caſe againſt Bird, and declares againſt him upon an Aſſumpſit made by the Defendant to the inteſtate, for the payment of a certain ſum of mony for a mariage portion, at 2 ſeverall dayes of payment equally, and that for not performing the ſame in the life time of the inteſtate, he brings this Action. The Plaintiff hath a Verdict: The Defendant moves in arreſt of Iudgement, and ſhews for cauſe, that the Plaintiff doth not well ſet forth the granting of the letters of Adminiſtration to him, for he ſayes, they were granted unto him by the Arch-deacon of ſuch a place, and doth not ſay loci illius ordinarium nor cui adminiſtratio pertinuit. 2ly. It is ſaid, that the mony was to be paid at 2 ſeverall payments, which amounts to two ſeveral promiſes, viz. a promiſe to pay the firſt ten pound on ſuch a day, and a promiſe to pay the other ſum at another day to come, and doth not allege any particular requeſt made by the inteſtate for the firſt ten pound. But Bacon Iuſtice over-ruled both the exceptions, and ſaid to the firſt; That the law doth take notice of an Arch-deacon being a publique Ordinary, and therefore it is not needfull to expreſſe, that the letters were granted per Archidiaconum of ſuch a place, Ordinarium illius loci or cui adminiſtratio pertinuit, but otherwiſe it were if they were granted within a peculiar juriſdiction. Therefore he ordered to ſhew better matter or elſe Iudgement ſhould be given for the Plaintiff.

Notice. Ordinary. Letters of adminiſtration. Peculiar.

Eeles and Lambert.

Mich. 23 Car. Banc. Reg.

vid. antea.

Argument upon ſpeciall verdict.

THe Caſe between Eeles and Lambert was again moved, which upon a ſpeciall verdict found was this; Sir Molton Lambert makes a leaſe of certain lands to Eeles for 21 years by deed, and Covenants for himſelf, his Executors, Adminiſtrators, and Aſsigns, that the leſſee ſhall peaceably, and quietly enjoy the lands let, during all the Term, the Leſſor makes his Will, and thereby makes Lambert the Defendant his Executor, and dyes, and by the Will divers goods in ſpecie are deviſed to ſundry perſons, Lambert the Executor delivers the goods bequeathed to the Legatees, Eeles is ouſted of the lands by I. S. and thereupon brings an Action of Covenant againſt Lambert the Executor, who pleads fully adminiſtred. The queſtion was, whether the paying of theſe legacies by the Executor were a devaſtavit, and ſo the Executor to be charged de bonis propriis to ſatisfie the Covenant broken or no, Green of Council with the Plaintiff, argues that it was a devaſtavit notwithſtanding that the deviſe was of goods in ſpecie, and that the Executor had only delivered them, becauſe that the Legatees had no property in the goods bequeathed them, before the Executor had delivered them, no more than if they had never been deviſed, and cited 2 H. 6. f. 16.

Devaſtavit.

Property.

16. and Cooks Lit. 111. and he said the finding of the Covenant broken was nothing to the purpose, and he said, it was a Devastavit, because it shall be intended, that the Executor might know of the Covenant made by the Testator, which he was bound also to keep, or else to satisfie for the breach of it, and the contingency whether the Covenant would be broken or no Covenant. makes no difference in the Case, for if it should it would prove mischievous in destruction of Covenants, which are to be accompted of as Debts, Doct. & Stud. lib. 2. C. 10. Dyer f. 324. Hob. f. 363, 397. But it may be objected, that if this should be a Devastavit then Legacies could not be paid, which would be dangerous to Executors, by reason of being lyable to suites for them, 21 Executors. E. 4 f. 21. Brook Tit. Proces, S. 10. To this I answer, It may be dangerous, yet it is not to the purpose, for an Executor should consider of such dangers, when he takes upon him an Executorship, and take notice of them, and he is not compellable to pay Legacies, and the Law will not protect him, if he pay them against Law, Hob. 246. and if the Court Christian endeavour to compel him he may have a Prohibition. 3ly. The Executor peradventure Prohibition. might conceive that there would be Assets afterwards, and in that consideration did pay the Legacies, and if the 5 Rep. Green and Harisons case, and 15 Iac. Robsons case be objected, I answer, this Case differs from them: for here the Question is between Legacies and Debts, and there between one Debt and another, to wit, between a Debt of a higher nature, and a Debt of a lower nature. Hales for the Defendant argued, that it was no Devastavit. 1. He agrees, that the Legatees have no property in the Property. Goods, by the devise. 2ly. If the Covenant had been broken when the Legacies were paid, it would have been a Devastavit. 3ly. He held, that the matter is as well found in the special verdict, as it might have been pleaded, and not put at all to the Jury to find. The Question here is, whether the administration of the Goods, before the Covenant broken, be good after it is broken, and there is good matter before the Court found in the special verdict, though it might have been found better. The first Argument I will draw from the nature of that, upon which the Action is founded, namely, the Covenant. The Action depends partly upon the Deed of Covenant partly upon the breach of it, and here is no ground of Action at the time when the administration of the Goods was made; and Harisons case cannot be avoided: for a Statute is a present duty, and ought to be Duty. paid before an Obligation. Robsons case 14. & 15 Iac. And it is as agree- Stat. able to Law, to pay a Legacy as a Debt upon a Covenant; and the mis- Obligation. chief to the Lessee in our case is not so material, as the mischief may be on the Executors part, & it is not materially objected, that he might take security, Security. for he cannot compel it. For the Objection that our Law takes notice of a Legacy, I answer, that the Law takes notice of a Legacy, as to give an interest in it to the Legatee, although he may not take it without the Exe- Interest. cutors consent. 2ly. It takes notice of it as remediable by the Law of the Kingdom, though not by the Common-law: and therefore consider the Common law, Statute 21 H. 8. of Administrations; and the Common-law is Judge of the Civil law. Statute, concerning Administration, and not the Spiritual-law, Hill. 17 Iac. Hinson & Buttons Case. The Common-law gives not a remedy for a Legacy, but the Spiritual-Court is supported by the Common-law to do Legacy. it: and by the antient Common-law there was remedy to recover a Legacy, 2 Rich. 3. f. 14. Glanv. lib 6, 7. C. 6, 7. and the power of the Ecclesiastical Court is derived from the Common-law, and the Common-law will take notice of a compulsary way in the Ecclesiastical-Court to pay a Legacy. And the payment in our case is executed, and now the Law takes notice of it, because the Defendant was compellable to it. If an Executor promise Promise. to pay a Legacy, an Action upon the case will lye against him, if he do not

pay

pay it. Roll Iuſtice, the Teſtator may defeat all Covenants by this means; and Greens reaſon is not anſwered, which is the great doubt in the caſe. It was Necton & Sharps caſe, 38 Eliz. that Legacies ought to be paid conditionally, viz. to be reſtored, if the Covenant ſhould be broken. When you argue again, argue to this point. Bacon Iuſtice cited a Caſe, 32 Eliz. in the Exchequer, againſt the opinion of Roll, and ſaid, if the Legacies ſhould not be paid, it might be a loſs to the Common-wealth: for it may be the Goods will periſh with keeping them, and the keeping of them may be a charge to the Executor, and no body ſhall have any benefit of them, for they may coſt more to keep, than they are worth, and a Devaſtavit lies not againſt an Executor of an Executor, for the Devaſtavit of the firſt Executor. Roll Iuſtice, the Eccleſiaſtical-law ought to make a proviſion againſt theſe miſchiefs, otherwiſe a Prohibition lyes againſt them. Appointed to be argued again Tueſday ſevennight.

Devaſtavit.

Prohibition.

VVatſon and VVatſon.

Mich. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1687.

Areſt of Judgment in Debt upon an Obligation to ſtand to an award. Award.

VVAtſon brought an Action of Debt upon an Obligation againſt Watſon, the Condition was, to ſtand to the Award of two Arbitrators, or of the Umpire. The Defendant pleads nullum Arbitrium. The Plaintiff replies, that the Umpire made the Award. The Defendant demurs, and ſhews for cauſe, that the Award was not good: for it was incertain, and not final on both parts, for one party was awarded to pay ſo much mony to the other, as in conſcience ſhould be due, and no man can ſay, what that is. The Court ſaid, the Award was inſenſible. And Bacon Iuſtice ſaid, it was a Vicars Award. Puliſton of Counſel with the Plaintiff cited theſe Books to prove the Award good, 8 Ed. 4. f. 2. 20 Ed. 4. f. 1, 4. 18 Ed. 4. f. 2. Paſc. 4 Iac. Goſnolls caſe, & 9 H. 7. and ſaid, theſe caſes proved, that where an incertainty in an Award may be made certain, there the Award is good, and ſo it is in our Caſe. 2ly. He ſaid, that the Award here is good, notwithſtanding it be to pay ſo much mony as ſhall be due in Conſcience: for it ſhall be meant as is due in Law: for Law and Conſcience are one and the ſame. But Roll Iuſtice ſaid, that the Award doth not make a finall determination of the matters in controverſy between the parties, and ſo it is no Award. And Bacon Iuſtice cited 5 Rep. That an Arbitriment ought to be certain, and final, and this Award wants both theſe properties; and therefore is not good.

Conſcience.

Fitchet againſt Wolſton.

Mich. 23 Car.

Demurrer to a Plea upon a Scire facias, againſt an Adminiſtrator. Scire facias with a Fieri facias.

FItchet had a Iudgement againſt I. S. in an action of Debt, I. S. dies inteſtate. Wolſton takes out Letters of Adminiſtration of the Goods and Chattels of I. S. Fitchet takes out a Scire facias, with a Fieri facias to enquire what Goods of I. S. are in the hands of the Adminiſtrator, and to take them in execution upon the Iudgement, Wolſton, the Defendant, appears to the Scire

Scire facias, and pleads, fully administred. The Plaintiff demurs to this Plea, and shews for cause, that in this Case he should have pleaded non Devastavit, and not fully administred. 2ly. The plea answers not the Writ. The Court answered, all such processes are only to make the Executors, or Administrators to answer, and therefore fully administred is a good Plea, for it is a good answer, and it would be dangerous to plead other waies. And Roll Justice said, that this being a Scire facias with a Fieri facias, according to the new manner of making the Writ, it would be dangerous to plead non Devastavit, and it hath been adjudged a good plea, to say fully administred in a Scire facias against an Executor, but it is better to plead nulla bona devenerunt ad manus, with which he could satisfie the Debt since the Scire facias brought. But this being a new case it is fit to be argued. Therefore let us have Books. Fully administred. Non Devastavit. Nulla bona.

Finer and Jeffry.

Mich. 23 Car. Banc. Reg.

FIner brings an Action upon the Case against Jeffry, and declares, that the Defendant did assume and promise unto him, that if he would forbear to sue one who had assaulted him and beaten him, that he the Defendant would pay the Plaintiff as much mony as he was damnified by the Assault and Battery; The Plaintiff hath a verdict. The Defendant moved in arrest of Judgement, and shewed for cause, 1. That it doth not appear by the Declaration, that the Plaintiff had any intention to sue the party for the Assault and Battery, and so the Assumpsit in consideration, that he would forbear to sue for it is no consideration. 2ly. He doth not set forth, that he gave any notice to the Defendant, what dammages he had sustained by the Battery. But the Court held, that the Plaintiff needed not to allege, that he had an intent to sue the party, for that the Defendant took notice of, when the Assumpsit was made: and for the notice what dammages the Plaintiff had sustained, the request to perform the Assumpsit implies that sufficiently, and so gave judgement for the Plaintiff. Arrest of Judgement in an Assumpsit. Consideration. Notice.

Dersly and Dersly.

Mich. 23 Car. Banc. Reg.

THree are endicted of Conspiracy and forgery, and one of them only is found guilty by the Jury. The party found guilty moved in arrest of judgement, and offered these Exceptions. 1. The endictment is for a joynt forgery, and so one only cannot be guilty: but if one be acquitted, all must be acquitted. 2ly. The endictment is for forgery, and causing to forge, which are two several and different Acts. But to these the Court said nothing; But took another Exception, namely, that the Conspiracy is not found upon which the Endictment is grounded, according to the Statute, for 2 are acquitted, and so there cannot be a Conspiracy in the third person, nor in any of them, for one cannot conspire alone. Arrest of Judgement upon an Endictment of Forgery. Conspiracy.

Bruer and Sowthwell.

Mich. 23 Car. Banc. Reg.

Arrest of Iudgement in an Action upon an Assumpsit.

Nudum pactum.

Consideration.

IN this case it was moved again in arrest of Judgement, upon the exception formerly taken, namely, that the words in the Declaration discounting for four Months were uncertain, and so there is no consideration for the Assumpsit, and then it is but nudum pactum. Roll Iustice said, the Declaration is insufficient for the incertainty: for it cannot be known what is meant by the word discounting. Yet he said, that though part of the Consideration, upon which the Assumpsit is grounded, be against Law; yet if the other part be good, and it may be divided, the Assumpsit is good notwithstanding. Yet we will hear Councel on both parts, before the Plaintiff shall have Iudgement. Antea. 27

Colson and Bedloe.

Mich. 23 Car. Banc. Reg.

Entred Mich. 22 Car. rot. 434.

Arrest of Iudgment in an Action upon the Case upon an Assumsit.

Jurisdiction.

Intendment.

Request.

Discontinuance.

Verd. &.

Pleading.

COlson brought an Action upon the Case upon an Assumpsit against Bedloe, and declares, that in consideration of so much money, paid by the Plaintiff to the Defendant, the Defendant did assume and promise to deliver so many loads of Hay unto him at such a place, and for not performing his promise he brings his Action. The Plaintiff hath a Verdict; The Defendant moved in arrest of Judgement upon these Exceptions. 1. The Declaration doth not set forth, that the place where the promise was made was within the Jurisdiction of the Court, which ought to have been, because it is the ground of the Action. To this Roll Iustice answered, that it doth not appear, that it is out of the Jurisdiction of the Court, and it shall not be intended to be so, if it be not alleged by the other party. A second exception was, that there is not a special Request set forth for the Defendant to carry and lay the Hay in the place alleged. 3ly. The pleading is out of Court, for want of a continuance to the Court, for the continuance is not to the Court, but to such a day only. 4ly. The Verdict is informal, and shews no cause why dammages are given. Roll Iustice to the first exception said, that the party ought to have taken advantage in pleading, that the cause of Action was out of the Jurisdiction of the Court, and not to move such matter in arrest of Judgement, for it is improper. But the Court ruled the Plaintiff to shew cause why Judgement should not be arrested upon the third exception. Afterward the same Term judgement was given, nil capiat per billam, against the Plaintiff for the discontinuance in the Process.

Tench

Tentch and Cletheroe.

Mich. 23 Car. Banc. Reg.

Pasc. 22 Car. rot. 332.

TEntch brings an Action of Covenant against Cletheroe, & declares, that the Defendant had covenanted with him to pay such a sum of mony into the Exchequer at such a time, and for not performing this Covenant he brings his Action. The Plaintiff hath a Verdict, & a Judgment. The Defendant brings his Writ of Error, & assigns for error, that the Plaintif had not set forth in what County the Exchequer is, and cites Hobs his case, Pasc. 8 Car. and a case 22 Car. C. Banc. That the County is material to be alleged, by reason of the Venue, 1 E. 4. 3. Cooks institut. 210. 21 H. 6. f. 4. The Court held that the County where the Exchequer was ought to be alleged, because the Exchequer is transitory, and not fixt to one place, and so there can be no Venue, because it appears not in what County it is. And for this cause the Judgment was reversed.

Error to reverse a Judgement in an Action of Covenant.

County.

Exchequer.

Venue.

Sawyer and Russell.

Mich. 23 Car. Banc. Reg.

SAwyer brought an Action upon the Case for speaking these words of him, Thou art a Witch, and hast bewitched my Cow. The Plaintiff hath a Verdict. The Defendant moved in arrest of Judgement for these reasons. 1. Such bewitching as is mentioned in the Declaration is not punishable by the Statute of 1 Iac. for it comes not within any of the branches of that Statute, neither that which speaks of death by Witchcraft, nor of the other branch: for it is not averred, that the Cow was hurt or destroyed by the bewitching, and so the party is not punishable. And it shall not be intended to be so, for the party shall not be punished by an Endictment by an intention, neither shall he be here in this Case. And 2ly. words ambiguous of this nature, shall be taken in mitiori sensu. Roll Justice said, that these words, Thou hast bewitched my Mothers Milk and Drink have been adjudged actionable, and here is a scandal of the party of whom the words are spoken; and the words thou hast bewitched, implies hurt done to the thing bewitched; and this case differs from an Endictment: for an Endictment must be more certain, than these words need to be. And a violent intendment as here is, may bring one within the compass of an Action. Therefore let the Plaintiff have his Judgement, if better matter be not shewn Monday next.

Arrest of Judgment in an Action upon the Case for words.

Witch-craft.

Intendment.

Words.

Nevill and Mott.

Mich. 23 Car. Banc. Reg.

NEvill brought an Action upon the Case against Mott, and declared, that the Defendant being in company with him with a Constable, did speak thus of the Plaintiff to the Constable, There he is, take him, for I charge

Arrest of Judgment in an action upon the Case for words.

him with flat felony, and after spoke these words of him also, Mr. Nevill hath taken my Sheep with a felonious intent. The Plaintiff hath a verdict; The Defendant moved in arrest of Judgement, that the words are not actionable, and cited Poland and Masons case, Hob. Rep. and alleged these reasons also. 1. Because the words were spoken to a Constable in prosecution of Justice, which shall not be taken hold of by a private person as a particular injury meant to him. 2ly. It is not said the words were spoken falso & malitiose, as it ought to have been. But to the second Exception, Roll Justice said, It is not necessary to say, they were spoken falso & malitiose, where they appear to be scandalous, for there the Action lies well, though it be not so expressed, and if one charge another with suspition of Felony, and speak such words of him, if they appear to be maliciously spoken, an Action very well lies. The rule was for the Plaintiff to take his Judgement, if better cause be not shewed to the contrary.

Averment.

The King and Hide.

Mich. 23 Car. Banc. Reg.

For quashing an Indictment before Commissioners of Sewers.

Hyde moved for the quashing of an Indictment taken before Commissioners of Sewers, wherein he was indicted for a nusance made in the high way by reason of penning of water in the River, at his Mill, whereby the water over-flowing the Banks did annoy the way, and he took this exception to the Indictment, that it did not say it was a navigable River. But to this Roll Justice answered, it was not necessary to say it was navigable: for if it be a common passage for water it is sufficient, and lies within the conusance of the Commissioners. But Roll Justice took another exception to the Indictment; That it sets forth this overflowing of the water to be a nusance to the high way, and for this the party is indicted, whereas Commissioners of Sewers have no power to meddle with such nusances in the way, but only with passages by Water. And for this cause the Indictment was quashed.

Sewers.

Nusance.

Monger and Shaterton.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 569.

Error to reverse a Judgement given in the Burrow-Court of Southwark.

A Writ of Error was brought in this Court to reverse a Judgement given in the Burrow-Court of Southwark, and the Error assigned was, that in the Venire facias one of the Jury is called Richardon, and in the Habeas Corpora he is called Richardson, which are two several names, and so it is uncertain what the proper name is. To this the Counsel on the other side said, that this fault is helped by the Statute, it being after a Verdict. But Bacon Justice said, he doubted whether it could be helped now in this Court, though it might have been helped in the inferior Court, where the Action was brought by examination of it, and therefore ruled to shew cause

Verdict.

cause why Judgement shall not be reversed on Friday next. It was this Term reversed at the Defendants motion for his own expedition.

Brooke and Brook.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 580.

BRooke brings an Action of Debt upon an Obligation against Brook, the condition was, that the Obligor should make an Estate of inheritance to the Obligee in such lands at such a day, and place, and for not doing it, he brings his Action. The Defendant pleads that he was ready at the day, and place, to make the Plaintiff an estate of inheritance in the lands; The Plaintiff demurs to the plea, and for cause shews that the Defendant doth not shew that he gave notice to the Plaintiff of his being there. To this Roll Iustice said, it is not necessary to give notice of the day or place. A second exception was that he had not shewed that he gave the Plaintiff notice what estate of inheritance he would make him. To this Roll Iustice said, he ought to have shewn, that he gave notice what estate he would make him, and therefore let the Defendant shew cause why the Plaintiff should not have Iudgement.

Demurrer to a plea in debt upon an Obligation.

Notice.

Time.

Place.

Kale and Iocelyne.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1282.

KAle brings an Action of Debt against Iocelyne an Executor, and declares for rent grown due since the death of the Testator, by virtue of a lease for years made of certain lands by the Plaintiff unto the Testator which yet continues, and declares, that the Executor debet & detinet, &c. The Defendant pleads fully administred, the Plaintiff demurs upon the plea; For pleading in the debet and the detinet: Bacon Iustice said, it was good, and so had been adjudged. To which Roll Iustice answered it had been adjudged pro & con, to be good and to be bad, and he said, that an Executor cannot waive a Term let to the Testator, for he is bound by Covenant to hold it, and said that the Declaration was good in the debet and detinet prima facie; for it shall be intended that the land let to the Testator is worth as much by the year, as the rent that is paid for it, till the contrary be shewn, and then it is reason that the Executor be charged; Bacon Iustice said, that the Executor may waive the possession, if he find that the rent is more than the land is worth, otherwise it may be mischievous to him. Roll Iustice said, that the Declaration must be in the detinet and debet, otherwise it will be mischievous to the Plaintiff, and said, that a specialty shall be satisfied before a rent reserved upon a lease by deed, which Bacon denied, and it was said, that a lease for years shall be assets in the hands of an Executor, although the rent reserved be the full value of the Lands let by the lease. The Defendant was ordered to shew cause why Iudgement should not be given against him.

Demurrer to a plea by an Executor in Debt for rent b ought : gainst him.

Plea.

Executor.

Waiver.

Covenant.

Assets.

Baker against Edmonds.

Mich. 23 Car. B. Reg.

Hill. 22 Car. rot. 222.

Special verdict in an Action upon the Case whether a verdict maintains the issue joyned.

BAker brings an Action upon the Case against Edmonds, and declares, that whereas I. S. was indebted unto the Plaintiff in a certain sum of mony, and afterwards being so indebted became a Bankrupt, and that a Comission upon the Statute of Bankrupt was taken out by him, and other creditors against him, and that it was found that the Defendant was indebted to the Bankrupt, the Commissioners of the said Commission did assign over the Debt of the Defendant mentioned in a certain schedule, amounting to such a sum, unto the Plaintiff, in part of satisfaction of the Debt owing unto him by the Bankrupt, by virtue whereof he demands the said Debt of the Defendant, who did assume, & promise to pay the same, and for not performing his promise, he brings his Action, the Defendant pleads non Assumpsit, and thereupon an issue was joyned, and a speciall verdict was found to the effect, as the Plaintiff had declared, but they further find that the Debts mentioned in the schedule, and assigned over to the Plaintiff amounted to such a sum, whereas they find that the Defendant did not owe unto the Bankrupt so much as that Debt assigned is, but a lesse sum. And upon this verdict the question was, whether the verdict did maintain the issue, which was non Assumpsit, if it did, then they find for the Defendant, if not, then for the Plaintiff. In the breaking of the Case it was moved whether the Assignment were good or no, in regard that the Commissioners had mistaken the Debt, for the Debt assigned by them was greater than the Debt found by the Jury, and so might be another Debt. But to this Roll Justice said, that the assignment was not judicially before them in question, for if it were, it would be judged an ill assignment, but here it comes not in issue but only whether the Defendant did assume, and promise or no, and the speciall verdict concludes not upon the assignment, but whether the speciall matter found do maintain the issue or no, & therfore he was of opinion that the Plaintiff ought to have his Judgment. Bacon Justice differed in opinion, & said, that it is dangerous for Commissioners of Bankrupt, to assign Debts particularly. The rule then was to argue it the next Term: At which time Ward of Counsel for the Defendant argued, that the verdict was for the Defendant for this reason, viz. Because the Debt laid in the Declaration, and the Debt found by the verdict are not the same, and so the Defendant did not assume, and promise that which is laid in the Declaration, for there is no such Debt found, and if he should be charged with that, he might be doubly charged, for he may be again charged for the debt found by the verdict, and circumstances of quantity, time and place are averred in a Declaration to make things certain, and if they fail the Declaration is not good, 18 E. 3. fol. 25. 1. rep. 74. Palmers Case. 2ly. The Declaration is insufficient, for it expresseth not what the sum is, but saith, a sum mentioned in a schedule of Debts, which is incertain: Roll Justice interrupted Ward. and said, all that you have argued is out of doors, but the last matter touching the Declaration, and to that Hales of Counsell with the Plaintiff said, the Declaration is good, and certain enough, for there appears no other sum in the schedule than is mentioned in the Declaration.

Verdict. Issue. Assignment.

Commissioners.

Averment.

Bacon

Bacon Iustice, The assignment is of the debt of this man due to the Bankrupt, be it more or be it lesse, and hath no reference to the accompt, and reckoning between them, & so the Assignment is good, though it agree not in the sum with what is justly due, and the issue is upon the Assumpsit, and not upon the Assignment, for the Assignment is admitted by the Defendant, and so not material whether it be an Assignment of the true sum or not. Judgement was given for the Plaintiff. Issue. Admittance.

Bruer and Sowthwell.

Mich. 23 Car. Banc. Reg.

THe Plaintiff in this Case moved again for judgement, notwithstanding what had been formerly spoken to arrest it, for though the word discomputando in the Declaration be insensible, yet ther is enough in the Declaration to ground the Action, and that is the breach of the Assumpsit assigned to deliver the Currants bought of the Defendant, and the word discounting shall not hurt it. Bacon Iustice was of the same opinion. But Roll Iustice said, all the bargain is here set forth upon which the Assumpsit was made, and if the bargain be ill, the Assumpsit is not good. Hales of Councell with the Plaintiff said, if part of the bargain be insensible, and part not, yet a good Assumpsit may be grounded upon that part which is good, But Roll said the bargain here is intire, and if part of it be not good it is all naught: yet he said if part of a bargain be good, and part void, yet an Action may be brought upon it. The rule was, That it should be argued again on both parts. Arrest of Iudgement in an Action upon the Case upon an Assumpsit. Assumpsit. Contract.

Seaman against Edwards.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 920.

SEaman brings an Action against Edwards, and declares against him as Executor of I. S. (whereas the truth was, that I. S. made 3 others Executors, and not the Defendant.) The Defendant pleads that he is not the same person named in the Will. To this plea the Plaintiff demurs, and for cause shews that he may be an Executor de son tort demesne, though he be not named in the Will, and so may be chargeable, and therefore he ought to have pleaded ne unques Administred come Executor, and of this opinion was the Court, and ordered the Defendant to shew cause why Iudgement should not be given against him. Iudgement was given for the Plaintiff. Demurrer to a plea pleaded by an Executor. Plea. Executor.

Dod against Eaton.

Mich. 23 Car. Banc. Reg.

DOd brings an Action upon the Case against Eaton for speaking these words of him, thou hast the French Pox, the Defendant pleads not guilty Exception to a speciall verdict.

guilty, the Jury upon this issue find a speciall verdict, viz. That the Defendant had said, thou hast had the French Pox, whereupon the Defendants Councell said, that the Verdict doth not maintain the words laid in the Declaration, and that the words that are found in the verdict are not actionable, and so the Plaintiff can have no Judgement, and cited 15 Jac. Nutcombes Case, and the words found are not issuable, and so the verdict is imperfect, 40 Ass. 41. Kelway 76. 18 Ed. 3. fol. 19. Pasc. 33 Eliz: Banc. Reg. Dame Ratcliffs Case. Dyer Sr. John Burges Case prove that the verdict is too short. Roll Iustice said, if the verdict be imperfect, there may be a new venire facias, and so it is against the Plaintiff, for he cannot have Judgement. Panell of Councell with the Plaintiff cited Osborn, and Brooks Case that the verdict was for the Plaintiff. But Roll Iustice said, that the Jury cannot find a thing that is not within the Declaration to maintain the Declaration, for they ought to hold themselves to the issue, and that they have not here done, and therefore the verdict is imperfect, and there must be a new venire facias to try the issue again, for Judgement cannot be given upon this verdict, for they do not find that he spake not the words in the Declaration which are the most material, so that the matter is not found fully enough for us to proceed to Judgement one way or other. Adjourned.

Verdict.

Venire de novo.

Verdict.

Poole against Coply.

Mich. 23. Ca. Banc. Reg.

Arrest of Iudgement in Trespasse.

POole brings an Action of Trespasse against Coply, and hath a verdict against the Defendant. It was moved in arrest of Judgement that the Declaration is incertain, for the Plaintiff declares that the Defendant cepit et asportavit decem coria, anglice hides, and the word Coria is uncertain, for it may be coria equorum, or coria ovium, or of any other Cattel. To this Roll Iustice said, that it is well enough, for the Anglice had made the word certain, and it is the usual maner to plead it thus. The Court ordered the Plaintiff should have his Iudgement, if better matter were not shewn to the contrary.

Anglice.

Hull against Gurnet.

Mich. 23 Car. Banc. Reg.

Demurrer upon a special plea in false imprisonment.

HUll brings an Action of false imprisoument against Gurnet, the Defendant pleads a speciall justification, that he took, and imprisoned the Plaintiff by virtue of a Commission granted out of the Court of the Admiralty, to examine the taking away of certain goods which were wracked by the Sea. To this plea the Plaintiff demurred, and shewed for cause; That the Defendant hath not set forth the Custom of the Admirall Court, that the first processe thereof is a Capias, and so it appears not, whether he have proceeded right or no. 2ly. It doth not appear that the matter for which the Commission was granted is Maritime, and other matter they ought not to medle withall. The Rule of Court was to shew cause why Iudgement should not be given against the Defendant upon this plea.

Custom.

Admiralty.

Smith

Smith againſt Stone.

Mich. 23 Car. Banc. Reg.

SMith brought an Action of Treſpaſſe againſt Stone pedibus ambulando, the Defendant pleads this ſpeciall plea in juſtification, viz. That he was carryed upon the land of the Plaintiff by force, and violence of others, and was not there voluntarily, which is the ſame treſpaſſe, for which the Plaintif brings his Action. The Plaintiff demurs to this plea: In this caſe Roll Iuſtice ſaid, that it is the Treſpaſſe of the party that carryed the Defendant upon the land, and not the Treſpaſſe of the Defendant: as he that drives my Cattel into another mans land is the Treſpaſſor againſt him, and not I who am owner of the Cattell.

Special juſtification in treſpaſſe pedibus ambulando. Treſpaſſ.

Mathew againſt Herle.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1554.

MAthew brought an Action of treſpaſſe againſt Herle for breaking his Fence, and entring into his Cloſe, &c. The Defendant pleads that I. S. was ſeiſed of this land, wherein the Treſpaſſe is ſuppoſed to be done, in fee, and ſo ſeiſed did demiſe the ſame for years by deed to the Plaintiff reſerving rent, in which deed was a clauſe of reentry for non payment of the rent, and afterwards made his laſt Will in writing, and dyed; by which will he gave the ſaid land in qua, &c. to the Defendant, and that after the rent was behind, and that he for the non payment of the rent according to the Covenant in the deed, by virtue of the clauſe of reentry did enter into the lands, which is the ſame breaking of the Fence, and entry for which the Plaintiff brings his Action, and demands Iudgement if the Plaintiff ought to have his Action. To this Plea the Plaintiff demurs, and ſhews for cauſe: That it doth not ſhew that the leaſe made to the Plaintiff is a leaſe of the land, in which the Treſpaſſe is ſuppoſed to be done. 2ly. The Defendant doth not ſhew that he did enter into the land by leave of the Executor, which he ought to have done; for though the land was deviſed to him by will, yet he cannot enter into the land without leave of the Executor. The Court ordered the Defendant to ſhew cauſe why Iudgement ſhould not be given againſt him upon his plea.

Demurrer to a plea in treſpaſs quare clauſum fregit

Licence.

Entry.

—— and Long.

Mich. 23 Car. Banc. Reg.

THe Plaintiff brought an Action upon the Caſe for theſe words ſpoken of him, Long is a murtherer, and hath bewitched my Child, and was the death of my Child, and obteins a verdict. The Defendant moves in

Arreſt of Iudgment in an action for words.

arrest of Judgement, and takes these exceptions to the Declaration. 1. That it is not said, that the Child was bewitched to death. 2ly. It doth not express whether the Child bewitched was born alive or not. To this the Court said, that the bewitching of the Child is Felony, though it do not dye by it. And to the second exception, That the Court doth not take notice of a Child if it be dead-born, and they will intend it was born alive; and Roll Iustice said, that these words Thou didst kill my Masters Cook, have been adiudged actionable, although the Plaintiff did not aver, that his Master had a Cook. Therefore let the Plaintiff take his Iudgement, if better matter be not shewn Saturday next.

Felony.

Averment.

Carver against Pierce.

23 Car. Banc. Reg.

Arrest of Iudgement in an action for VVords.

CArver brings an Action upon the Case against Pierce for speaking these words of him, Thou art a Thief, for thou hast stollen my Dung, and hath a Verdict. The Defendant moved in arrest of Judgement, that the words were not actionable: for it is not certain whether the Dung be a Chattel, or part of the Free-hold, and if so, it cannot be Theft to take it, but a Trespass, and then the Action will not lye. Bacon Iustice, Dung is a Chattel, and may be stollen. But Roll Iustice answered, Dung may be a Chattel, and it may not be a Chattel; for a heap of Dung is a Chattel, but if it be spread upon the Land it is not, and said, the word Thief here is actionable alone, and there are no subsequent words to mitigate the former words: for the stealing of Dung is Felony if it be a Chattel. Bacon Iustice said, It doth not appear in this Case of what value the Dung was, and how shall it then be known, whether it be Felony or pety Larceny? To this Roll answered, the words are scandalous notwithstanding and actionable, though the stealing of the Dung be not Felony. The rule was, to move it again Tuesday next.

Chattel.

Felony.

Mich. 23. Car. Banc. Reg.

Error to reverse a Iudgment, for discontinuance in the Process.

A Writ of Error was brought in this Court to reverse a Judgement given in the Marshals Court, and the exception taken was, that there was a discontinuance in the process, and so there ought to have been no Judgement, and therefore the Judgement given is erroneous; and that there was a Discontinuance it thus appears. The Continuance was ad proximam Curiam, and it appears upon the return of the Venire facias, that that was no Court day, for it was the three and twentyeth day of the Month, whereas Friday, on which day the Court was held, was not the 23 day, and so there is Error in the continuance. Roll Iustice said, the former Continuance was to the 9th. day, and from thence to the 15th. and that is but six daies, and so wants of the time. Bacon Iustice, Where there is a Discontinuance the Court hath no power to give Judgement, and so the Judgment is here erroneous, and therefore let it be reversed, nisi causa, &c.

Discontinuance.

Iudgement.

Mich.

Mich. 23 Car. Banc. Reg.

LEssee for years of Lands by Deed, brings an Action of Covenant against the Lessor, and declares, that the Lessor had covenanted, that he should peaceably and quietly enjoy the Lands let during the Term, and that a Stranger entred upon him, and ousted him within the Term. To this Declaration the Defendant demurs. Roll Justice said, that the Covenant in this Case is broken, though it be a Stranger that entered and ousted the Lessee. Walker of Council with the Defendant took this difference, where a Stranger enters upon the Lessee and doth a Trespass, and where he enters and outs the Lessee; in the former Case he said, the Covenant is not broken: but in latter it is broken. Judgement was given for the Plaintiff except cause should be shewn Monday next.

Demurrer to a Plea in an action of Covenant.

Covenant.

Thynn against Thynn.

Mich. 23 Car. Banc. Reg.

Hill. 23 Car. rot. 1658.

THynn brought an Action of Dower against Thynn, and hath a Judgement by default, and thereupon a Writ of Enquiry issued out to the Sheriff, who delivered seisin of the Dower recovered, and returned the Writ; upon this Judgement, The Defendant brings a Writ of Error, and assigns these Errors in the Record. 1. The original Writ appears not to be returned according to the Statute: for the year doth not appear when it was returned. 2ly. The Proclamation made by the Sheriff appears not to be where the Land lyes. 3ly. The return doth not mention that the Proclamation was after the Summons, as it ought to be, as it is Hob. Reports, in Allens Case. 4ly. It is not said that he did make Proclamation upon the Land. 5ly. It appears not that the Proclamation was in the Parish where the Summons was, as the Statute directs. To these exceptions Hales of Council on the other side, answered. To the first, that the return of the original Writ shall be intended to be in the year of the Reign, and not of the Age of the King, though the word Reign be omitted. To the second, the Lands lye in divers Parishes, and Proclamation at the Church of any of the Parishes is good enough. 2ly. It doth not appear, that there are divers Churches in New-Sarum where the Proclamation was made. To the third exception, the Proclamation is said to be made prout breve postulat, and that shall be supposed duly done, and implies all requisite circumstances, and he cannot make another return, and it is impossible to be otherwise. To the fourth, it is not necessary to return the place of the Summons, and it is said that it was made secundum formam Statuti, which supplies the rest. And to this the Court said, that the words secundum formam Statuti extend far. And Roll Justice said, that Proclamation in one place was good in all. Holhead of Council with the Plaintiff, in the Writ of Error proceeded, and took these exceptions in the demand of the Dower. 1. The demand is generally de rectoria, which is not good, for the incertainty of it: for there may be a Rector of a College, of a Province, of a Bishoprick,

Error to reverse a Judgement in Dower.

Return. Proclamation.

Summons.

Return.

Demand. Rector.

shopzick, as well as of a Parish-Church, and therefore it ought to have been de Rectoria Ecclesiæ parochialis de &c. 12 H. 4. f. 29. pl. 1. 2ly. The demand decimarum is too general, and not good, and it ought to have been decimarum granorum, fœni, &c. for the demand de omnimodis decimis quibuscunque is too general, 11 Rep. Herberts case. 1. To these exceptions Hales answered, that a demand in a Writ of Dower need not to be so exact as in other original Writs: for original Writs are not alterable, but ought to answer the forms in the Register. To the second he said, that rectoria shall be intended the Rectory of a Church, and the Statute extends not to this: besides the place of the Rectory is described, which makes it certain enough. To the third, it is not necessary to express the Tithes particularly, and the demand being of the Rectory it comprizeth all the Tithes, also the demand is de omnimodis decimis which is a general demand, and comprizeth all, and is not de decimis only, for that might be incertain. Holhead, The demand is de rectoria & de omnimodis decimis, which is a demand of one thing twice, and that is not convenient, for by this means the party may recover damages twice, and the Court will be also inbeagled by this means, and it matters not though we have not pleaded to this: for the Court ought to take notice of it, because it is in the original Writ. Notice. Next there is no form in the Count, for cum pertinentiis is informal, for it refers to the Parish, and not to the Mannour, 27 E. 3. f. 86. Pl. 3. Hales, This is but a variance in form, and is not material, and also it shall be intended to refer to the Mannour, and not to the Parish. Holhead, The demand is not warranted by the Writ, for the Mill and Parish are not named in the Writ, but are named in the demand, 11 Rep. Arondels case. Hales, The demand is not de rectoria in Tymsbury, but de Tymsbury, and is the denomination of the thing demanded, and not of the Mill where it lyes. Holhead, It is not said, where the Tithes extend, and they may extend to divers Mills, as a Parish may, 19 E. 3. f. 9. Tithes. Parish. Hales, Here is one demand, and it includes all the Tithes. Roll Justice, You have demanded the Rectory in Tymber, and not the Rectory of Tymber, and by the grant of ones Mannour in Dale, no more of it passeth than what doth lye in Dale, and here it shall be intended so much of the Tithes as are in Tymber. Grant. Holhead, Here is a demand of Dower of such things whereof Dower lyes not, viz. of a quarry of Stones, and it appears not that the Quarry was open in the life of her Husband; and if it were, yet it is improper to demand it by the name of a Quarry. Hales, the word Quarry is a good word, & well-known what it means; for Quarrera is an old wel-known Latine word for it, and she is as well dowable of it as of a Mine of Coles, and it shall be intended to be open, because she demands it by that name of a Quarry. Dower. Holhead, The demand of the Dower is also of a Hundred, of which a Woman is not dowable, because it is an entire thing, and cannot be divided, and the demand should have been de tertia parte proficuorum hundredi. To this Roll Justice answered: then by your reason she shall never keep a Court. Hales, It is well enough demanded, for a demand shall be of the thing it self, and not of the profits of it, for the profits were not in the Husband, but he was seised of the Hundred, and the profits are a thing incertain. Holhead, The execution of the Habere facias seisinam is not well executed, for by it two third parts are assigned for Dower, and that is more than the demand. Hales, That is but a repetition of the thing demanded. Holhead, A thing not demanded at all is assigned for Dower, viz. view of Frank pledge. Hales, That is but an incident to another thing that is demanded, viz. the Hundred, and by the demand of the Hundred the view of Frank-pledge is demanded, and all other incidents to the Hundred. Holhead: Here is an assignment also of all tenures, and she cannot have Homage, because she is a Woman. Hales, She shall have all te-

nures

nures which she is capable of, and so all shall be understood in this place, and no other she shall have. Holhead. The Judgement is also of 15 Copiholds & Tenements which lately were Copiholds. Roll Iustice, This is good enough, and what loss have you by it? Holhead, The Assignment is also of the 3d. part de Copicia & de Structuris, and other words there are which are also incertain. And there is error in the assignment of dammages: for the dammages are assigned ultra valorem terræ, which is against the Statute. Roll Iustice, the Statute is an addition of the value and dammages, for the Judgement is perfect without returning the Writ of the dammages, and so hath been adjudged in the Common pleas. Holhead, Here is an ill suggestion of the Feme, for she suggesteth, that her Husband dyed seised in fee of all the Lands out of which she demands her Dower, and that is not true, for he dyed seised of part of them in tayl. To this the Court said, that is not material if he dyed so seised, that she ought to have Dower. Holhead, Dammages are given ultra valorem, which I conceive is not good. Roll Iustice, It is well enough: for dammages are given, and the value by the Statute. Holhead, The return of the Elegit is not good. Hales, That is another Record, and appears not now in the Court. Roll Iustice, The Elegit hath no reference to the former Record. Holhead, There is one error in fact, and that is confessed by your joyning in demurrer. Roll Iustice, You might have demurred for this doubleness, for one cannot assign an error in fact, and another error in Law in a Writ of Error, for this is double. Hales, It is true, but we have lost that advantage. Adjourned to be argued again the next Term.

Dammages, Judgement.

Doubleness.

Robinson against

Mich. 23 Car. Banc. Reg.

ROBinson brought an Action of Trover and Conversion against T. B. and hath a verdict. The Defendant moved in arrest of Judgement, and shewed for cause, that the Declaration was not good, for the Plaintiff amongst other things declares, that the Plaintiff had found and converted to his own use unum vestigium, Anglice a Footstool, whereas it signifies a Footstep, or a print of the foot, and not a Footstool. 2ly. The Plaintiff declares pro decem ponderibus Aeris, meaning ten pound of Brass, whereas it should be æris with a Dipthong, for Aeris is of Ayr, and not Brass. But this exception was over-ruled by the Court, because in the writing of Court-hand, in which hand Declarations are written, there are no Dipthongs used, and so the word Aeris might as well signifie Brass as Ayre. But for the other exception, judgement was stayed till the Plaintiff should move.

Arrest of Judgement in Trespass.

No Dipthongs in Court-hand.

Izack against Green.

Mich. 23 Car. Banc. Reg.

IZack brings an Action upon the Case in London against Green, for calling her Whore. Green removes the cause by a Habeas corpus into this Court, and hath a Supersedeas to stay the Plaintiffs proceedings in London. The Plaintiffs Counsel moved for a Procedendo, that he might proceed in London, because that in London, by a special Custom there an Action doth lye

For a Procedendo to try an action in London.

for calling a woman Whore, though out of London it lyes not, and cited Pascal and Barbars Case 21 Iac. to prove it. Bacon Iustice, The custom of London is to be certifyed that we may Iudge of the reasonablenesse of it, and we are not to take notice of it upon a surmisse, and it seems that a procedendo should not here be granted, because the matter with which she is charged by the words belong to the Constance of the Civill law to try it, and not to our Law, as it is 2 H. 4. Roll Iustice, One may in some Cases have an Action at the Common law, where he may have remedy also in the Ecclesiasticall Court; for the Common law is to be preferred, and by a special custom as the Case here is, an Action may be maintained where it lyes not at the Common law, and so was it held 8 Car. and 13 Car. And if there should not be a procedendo granted in this Case, the Plaintiff would be tyed up by the habeas corpus, but if it be granted the matter may be tryed, and upon that if the Iudgement be erroneous a writ of Error may be brought in the Hustings in London, and so all the matter may come in question to be argued, and he said that a Charter cannot give an Action, which the Common law allows not. But let the matter rest as it is till we can agree.

Procedendo. Notice.

Action.

Mich. 23 Car. Banc. Reg.

Arrest of Iudgement in an action upon the case.

The Plaintiff brought his Action upon the Case, for these words, thou mutton-monger theef bring home my stolen hay. The Defendant makes a special justification, that the Plaintiff had stollen a sheep, and upon this was an issue joyned, and a verdict for the Plaintiff. The Defendant moves in arrest of Iudgement that the Declaration was not good; for it only chargeth the Defendant with speaking of the words, and doth not say dixit de querente, and though those words be in the replication, yet that makes not the Declaration good. Roll Iustice, The Declaration is not good, for the words may be spoken of any other body, as well as of the Plaintiff. Bacon Iustice agrees with Roll, and said, that the word dixit was not in the Declaration, and so it appears not whether the Defendant spoke, or writ, or thought the words, and which is more it is not said, that the words were spoken in the presence of any body, and then they cannot be scandalous; Roll Iustice said, one cannot relopn upon words, which are not in the Declaration nor in the plea; for if the Declaration, and the plea be naught, the replication cannot make them good. The rule of Court was nil capiat per billam, except cause shewn Saturday following.

Replication.

Kinpe against Iohnson.

Mich 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 154.

Error upon a Iudgement in Hull. Continuanc

A Writ of Error was brought to reverse a Iudgement given in Hull, for these Errors assigned. 1. That one of the continuances was to a certain day of the month, where it ought to be ad proximam curiam; 2. The Declaration was pro se decem bestiis, Anglice Cows or Whyes, which is too general; for the word bestia may signifie any beast whatsoever as well

well as a Cow. The Iudgement was reverſed except cauſe ſhewn to the contrary.

More againſt Clipſam.

Mich. 23 Car. Banc. Reg.

MOre brings a Replevin againſt Clipſam, and declares of a hundred oves Matrices et vervices diſtrained by Clipſam. Clipſam demurs to the Replevin for the incertainty of it; for it appears not how many of the hundred sheep diſtrayned, and replevied, were Matrices, or ewes, and how many were vervices, or weathers; Maynard moves for Iudgement in the Replevin for the Plaintiff, and held that centum oves alone was good, and certain, and the addition Matrices, and vervices, ſhall not make an incertainty, and the writ of Replevin doth not ſhew the cattell diſtrained particularly, but the help of the party, and the view of the Sheriff muſt concurr to ſhew what Cattel are to be delivered by the writ. 2ly. Here is a good iſſue argumentative, although it be not ſo formal. 3ly. There is no more in the iſſue at the Bar, than in the avowry, for all the Term is but one day, & ther is no diviſion of time in it, & it is dangerous to make fractions, & a Statute acknowledged in the Term relates to the firſt day of the Term. Hales on the other ſide agreed that centum oves without ſaying any more had been certain enough, but as they are here diſtinguiſhed into Matrices, & vervices, there is no certainty at all; for the Cattel in kind are demanded, and ought to be delivered as they are demanded, ſo that if the demand be incertain there can be no certain delivery. 2ly. The iſſue is ill, and is not helped by the verdict; for 1. the title made is not anſwered. 2. The traverſe is only to the concluſion, and ſo is but by way of inference, and is not helped after a verdict; for the plea is not anſwered: for the words fuit et adhuc eſt ſeſitus is not good, for it is not material whether he were ſeiſed at the time of the diſtreſſe or no, but whether he were ſeiſed at the time of the replevin, and there is a diſtance between the replevin, and the avowry, and there is a prius and a poſterius in it. Roll Iuſtice ſaid, it is made up in the return, and there is no diſtinction of time, and if one plead an ill plea, and the iſſue upon it be found againſt him, he ſhall not take advantage of his own ill plea, and if there be a negative, and an affirmative, though the iſſue be not well joyned, it is helped by the Statute of Ieofailes, otherwiſe, if there be not an affirmative, and a negative; for then there is no iſſue at all joyned to be helped. Bacon Iuſtice, Oves matrices et vervices is ill; for the Sheriff knowes not what return to make; Roll accords, and ſaid, you have made that which was certain, to be incertain by the ſpecification you have made, and a replevin is a demand, and ought to be as certain as a precipe. Iudgement was given againſt the Plaintiff in the caſe at the bar, becauſe the Declaration was ill, and uncertain.

Argument upon a Replevin.

Incertainty.

Iſſue.

Term.

Statute.

Relation.

Traverſe.

Advantage.

Gilbert

Gilbert agaiaſt Stone.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 1703.

Demurrer upon a plea in Treſpaſſe.

Gilbert brought an Action of Treſpaſſe quare clauſum fregit, and taking of a gelding, againſt Stone. The Defendant pleads that he for fear of his life, and wounding of twelve armed men, who threatned to kill him if he did not the fact, went into the houſe of the Plaintiff, and took the gelding. The Plaintiff demurred to this plea; Roll Iuſtice, This is no plea to juſtifie the Defendant; for I may not do a Treſpaſſe to one for fear of threatnings of another, for by this means the party injured ſhall have no ſatisfaction, for he cannot have it of the party that threatned. Therefore let the Plaintiff have his Iudgement.

Treſpaſſe.

Symons and Low.

Mich. 23 Car. Banc. Reg.

Trin. 23 Car. rot. 650.

Error upon a Iudgement for words. Plaint.

Symons brings an Action upon the Caſe againſt Low for ſpeaking theſe words of him, She, innuendo the Plaintiff, is perjured, and hath a verdict, and a Iudgement; the Defendant brings a Writ of Error to reverſe this Iudgement, and aſsigns for Error that the plaint was entred the ſame day that the words were ſpoken, which was ſaid ought not to be, becauſe the Action ſhould be brought after the words ſpoken, which ſhall not be intended to be if it be the ſame day, becauſe the Law admits of no fractions of time, which will be, if a day be divided into ſeveral parts, as it here muſt be, for there muſt be one hour ſuppoſed when the words were ſpoken, and another hour when the plaint was entred. But Roll Iuſtice ſaid, it was well enough, and ordered the Plaintiff to take her Iudgement, if cauſe were not ſhewn before the end of the Term.

Fractions.

Cheevers againſt

Mich. 23 Car. Banc. Reg.

To quaſh a ſcire facias.

Upon a rule of Court to ſhew cauſe why a ſcire facias to revive a Iudgment was not good, This was offred for cauſe, that it doth not ſhew before whom the Iudgement was given, which was to be revived by the ſcire facias, and conſequently there appears no Iudgement to warrant the ſcire facias. To this Roll Iuſtice anſwered, that in the Common pleas the courſe is to ſet forth before whom the Iudgement is given, but in this Court the courſe is not ſo: But how comes the Record hither? The Counſell anſwered, That there was a Iudgement in Canterbury, and upon that a Writ of Error was brought in this Court, and the Iudgement affirmed upon that Writ of Error, and then a Scire facias iſſued out here upon the Iudgement againſt the bail, and upon this the bail moves upon the record, that there is error in the ſcire facias. Roll Iuſtice, The Record is well enough; In a ſcire facias it is not requiſite to ſay Conſideratum eſt per curiam. Therefore let the ſcire facias ſtand.

Scire facias.

Carver

Carver and Pierce.

Mich. 23 Car. Banc. Reg.

THe Case between Carver and Pierce was again moved by Holes, wher- Arrest of Judgement for words.
in it was moved formerly in arrest of Judgement that these words Thou art a theef, and hast stolen my dung are not actionable: That the words are actionable for these reasons. 1. The first words are actionable, and the second words are accumulative, and aggravate the former words, and do not mitigate them. 2. It may be felony to steal dung, and the violence of the words do enforce it to be so intended. Bacon Iustice, I hold that Judgement is to be given for the Plaintiff, and so it was for these words, thou art a theef, and hast stolen my Corn. Roll Iustice was of the same opinion, and said that the second words are not violent enough to allay the first words, and are not explanatory, and by way of mitigation; for the words are not, for thou hast, but they are, and thou hast stollen my dung. Iudgement was given for the Plaintiff. antea.

Eeles and Lambert.

Mich. 23 Car. Banc. Reg.

THe Case between Eeles and Lambert was again argued by Latch for the 2 Arguments upon a plea by an Executor.
Plaintiff, and by Twisden for the Defendant, Larch argued to this effect, That the Legatee hath no right in the legacy, untill it be delivered unto him by the Executor, 2 E. 4. fol. 13. but if a legacy be given in this manner, if I Legacy.
dye let my Cosen have such a thing, there the Legatee may take the legacy without the delivery of the Executor, and a thing which cannot be devised Administration.
cannot be administred. Bracton lib. 2. C. 26. 7 H. 6. A devise is void if there Devise.
be not sufficient goods besides to satisfie the Debts of the Testator. 2. The disposition of the Testator ought to agree with the law of God, the law of nature, and the Law of the Land; and whereas it is objected that there will be an inconvenience, if the legacies shall not be paid, I answer, the Law regards not this inconvenience; But 2ly. this inconvenience is none in respect of the inconvenience will be on the other side if the legacies be paid, namely the breaking of the Law of God, the Law of Nature, and of the Land, and the inconveniences supposed are helped by the Civill Law, for it takes cau- Caution.
tion in paying of legacies to repay them in such accidents as are in our Case. Twisden for the Defendant argued, that it was a good administration of the goods, and that there is no assets in the hands of the Executors, and he agrees that a devise of goods in specie, and a devise of mony is all one; but this is not a Debt, and so is not to be paid; for in Judgement of Law, it is presumed that the Covenant shall not be broken, and that it shall not be respected in regard of the incertainty whether it shall be broken or no, but the Law takes notice of the Will, and it is of temporal conusans, 2 Rich. 3. 11 H. 7. f. 12. and it takes notice of a legacie to try the right of it, and to discharge it, and the Executor here is compellable to pay the legacies, and cannot refuse it neither by the Common law, nor by the Spiritual law; but it is objected that it is inconvenient that one shall avoid his Covenant.
own Covenant by his own devise. To this I answer, he might have done it in his life by giving away all his goods; and 2ly. There shall not be intended to be fraud in the Will, and there are more inconveniences of our

part in not paying the Legacies, than on their part by paying them: for by this means, men shall have no power to dispose of their own Goods by Will, by reason of Covenants in Leases and Deeds made by them; and the Spiritual Court cannot compell a Legatee to put in security for his Legacy, as is surmised. Adjourned to the next Term to give Judgement.

Security.

Mich. 23 Car. Banc. Reg.

VVhether an Attornment good or not.

Attornment.

THe Court was moved to deliver their opinion in a Case formerly moved, wherein the Question was, whether an Attornment made by a Lessee for years the same day that the rent was due to be paid upon his Lease to him that had purchased the reversion of the Land let unto him, and for which the Purchaser had brought his Action, be a good Attornment. Roll Justice said, that it is a good Attornment by the averment made, and by the finding of the Jury, and that Judgement ought to be for the Plaintiff. Bacon Justice agrees, and said, the Attornment shall be intended to be before Sun set, and not afterwards. Therefore let the Plaintiff take his Judgement.

Parmiter against Cressey.

Mich. 23 Car. Banc Reg.

Cause why Judgement should not be given in an Action upon an Assumpsit.

Averment.

Notice.

Request.

THe Defendants Counsel upon a former rule of Court to shew cause, offered for cause why the Plaintiff should not have Judgement. 1. Because the Plaintiff had not averred that he did make any election of the Wines that the Defendant was to deliver unto him. 2ly. He doth not aver, that he gave the Defendant any notice of his election, and there being a Condition precedent to be performed on the Plaintiffs part, implyed, the Defendant cannot perform the Bargain, without notice of that performance. 3ly. Here is no good request expressed either in substance or circumstance, for for the circumstance there is but two dates to do it, in which it cannot be well intended it could be done. 4ly. It is said, he did not deliver vinum prædictum, which is an incertain implication of a Request: for the word deliberare is not a proper term to express the Request, and the verdict doth not help it. Bacon Justice, There ought to be an election by the Plaintiff, but the Defendant ought first to shew the Wines, and it was of his part to have appointed the time when he would shew them. Roll Justice, The Promise and Request was at Norwitch, and it was sufficient for the Plaintiff to make the Request there: but the Defendant ought to shew the Plaintiff the Wines, without which the Plaintiff can make no election, and the substance of the Declaration is to this intent. Judgement was given for the Plaintiff.

Election.

Mich. 23 Car. Banc. Reg.

VVay a Prohibition should not be granted.

BY the rule of the Court, this day cause was offered to be shewn why a Prohibition should not be granted to the Ecclesiastical Court, for granting Letters of Administration to a Sister of the half-blood, when there was a Brother of the whole-blood who sued for them, and was denyed. The cause shewed

shewed was, that it is in the power of the Ordinary to grant Administration, either to the Brother of the whole-blood, or to the Sister of the half-blood, at his election, because they are in equal degree of kin to the Intestate. And to this the Court agreed. But Bacon Justice said, that in the Case at the Bar, Letters of Administration are granted to the Husband and his Wife, and so to one, viz. the Husband, who is no kin at all to the Intestate, but a Stranger, and if he survive his Wife, he shall have all the Goods, and all the kindred will be defrauded, which is not reasonable, and therefore the Administration is not good. And for this reason a Prohibition was granted.

Mich. 23 Car. Banc. Reg

IT was moved in arrest of Judgement, that the Plaintiff had declared of the Trover & Conversion, of a certain number expressed in the Declaration of pieces panni lanii, Anglice, of red, yellow, and black Coath, which is uncertain, and cannot be used, as it is here, to express Cloaths of divers colours, for panni lanii signifies only woollen Cloaths. But Bacon Justice said, all is but woollen Coath, though they be of divers colours, and therefore it is good enough. Hodsden the Secondary said, sometimes the colours are used to be expressed, and sometimes not. Bacon, It is better to express the Colours than not, yet it is good enough without the expressing of them. Therefore let the Plaintiff take his Judgement. Arrest of Judgement in Trover and Conversion.

Willison and Crow.

Mich. 23 Car. Banc. Reg.

WIllison brought an Action upon the Case against Crow, for speaking these words of him, You are a bankrupt Skrub and hath a verdict; it was moved in arrest of Judgement, that the words are not actionable, because they are Adjective words, and so are not positive enough to ground an Action. But the Court held, they were actionable, for the word Banckrupt in it self was not an Adjective, and the joyning of it with Skrub made it not so, but it should be understood as much as to say, You are a Skrub, and also a Banckrupt. And judgement was given accordingly. Arrest of Judgement in an Action for words.

The King against Holland.

Hill. 23 Car. Banc. Reg.

THe Court delivered their opinions in the Case between the King and Holland formerly argued; And first Bacon Justice said, that there can be no Judgement, for there is a mis-tryal in it; for first, there is no Venire facias: and secondly, there is a discontinuance, because the Venire should be to return duodecem probos & legales homines quorum quilibet habet 40 s. lands by the year at the least, & it is every of whom, having 4 l. lands by the year, which is contrary to the direction of the Statute. To this Roll answered, that he held the Venire to be good, and so the tryal good, for if the Jury hath every of them 4 l. a year in Lands, he hath 40 s. a year in Lands at least, Judgement given in the Case between the King and Holland.

and more, and therefore it is a better Jury, and more sufficient; and by this the verdict shall not be vitiated, though the Venire be not quorum quilibet habet 40s. per annum ad minus, as the Statute directs, and he cited 21 Iac. Philpot and Fielders Case to be so adjudged; and he said, that Lands in the hands of a Trustee may be extended for the Kings debt, but that he did not conceive how the King can have Copyhold-lands that are in trust for an Alien. Bacon Iustice, The Commissioners that found this inquisition for the King had no power by their Commission to seize the Lands into the Kings hands, but only to enquire what Lands the Alien had. The Court ordered, that cause should be shewn Tuesday following, why the party shall not be restored to his Lands, which were seised into the Kings hands by vertue of the Inquisition. Postea.

Extent.

Seisure.

Hill. 23 Car. Banc. Reg.

Error upon a Iudgement in an Action upon the Case.

Incertainty.

Tryal.

A Writ of Error was brought to reverse a Judgement given in an Action upon the Case, upon an Assumpsit, brought by two at Maydston in Kent, and the Error assigned was, that the Plaintiffs in their Declaration do say unde dixerunt quod deteriorati sunt, &c. whereas it should be unde deteriorati sunt, and not dixerunt, &c. for that is positive, and the other not, for they may say they are damnified, and be not, and there can be no tryal upon such uncertain words. Roll Iustice said, the words are not well laid; yet if there were other words sufficient to expresse the dammage the Plaintiff had received it would be good enough, but these words here govern the whole sentence; Therefore let the Defendant in the Writ of Error consider how he can make the Declaration good.

The King against *Savage*.

Hill. 23 Car. Banc. Reg.

For quashing an Endictment for Felony.

Incertainty.

Iniquition.

One Savage was arraigned in this Court upon an Endictment of Felony, for killing of a Woman within the Verge. The truth of the Case was, he beat and wounded the Woman at Lesne Abby in Kent, which is within the Verge, but the Woman died at Sevenock in Kent, which is out of the Verge. The Prisoner prayed the Court he might have Walker of the Inner-Temple assigned him for Counsel, for matter in Law, which the Court granted. Walker for the Prisoner, prays the Endictment may be read, which was done accordingly; Whereupon he took these exceptions to it, 1. That the Endictment doth not shew upon what part of the body particularly the Woman was wounded, but it saith only generally, that it was upon the hinder parts of her Body. 2ly. It sayes the Woman died de diversis plagis, but it doth not shew of what length and breadth the wounds were, as it ought to do, nor doth it say of which of the wounds she died, and so it is uncertain, and cannot be known whether the Wounds were mortal or no. 3ly. By the Statute de Articulis super Chartas, in this Case where the party was wounded within the Verge, and died without the Verge, the Coroner of the Verge, and of the County ought to joyn in taking the Inquisition super visum Corporis, which is not here done; but the Inquisition is taken by the Coroner of the Verge only. Bacon Iustice said, the party is said to be slain where he dies, not where he was wounded. The Court ordered the Prisoner to appear a week after, and in the mean time

to

to give notice to the Kings Councel of the Exceptions taken to the Endictment, and know whether they will maintain the Endictment; the same Term the Endictment was adjudged not good, and the party was bayled. Bail.

Thyn against Thyn.

Hill. 23 Car. Banc. Reg.

Hill. 22 Car. rot. 1638.

DAme Katherine Thyn brings a Writ of Dower in the Common-pleas against Sir James Thyn, and hath a Verdict, and a Judgement; the Defendant brings a Writ of Error to reverse this Judgement in this Court, and assigns for Error; 1. In the Return made by the Sheriff, for he doth not say, that the Proclamation was made at the Church of the Town, where the Summons was made, and a Summons upon any one part of the Land, as hath been objected on the other side, is not good, neither by the words, nor the intent of the Statute: for then the words in the Statute should be surplusage and idle, that particularly directs how it should be. And as to the Objection, That a Summons upon one part of the Land is good in fiction of Law, for the rest of the Land, I answer, That this is not so where the Statute directs the Summons, and the words secundum formam Statuti cannot help where the Statute is not shewed to be pursued, and so saith Dyer, That substantial words ought to be mentioned, Hill. 24 Iac. Hob. Pl. 179. Allen and Walkers Case. 2ly. There is Error in the Demand of the Dower: for the certainty of the Tithes demanded ought to appear, and it doth not so here, 11 Rep. Harpers Case, f. 25. And for that which is said in answer unto this, That a Demand of Dower is different from other Demands, I agree it to be true. 8. H. 6 3. Yet the things demanded in Dower must be certainly demanded, 11 H. 7. f. 25. as it is in an Assise, for an Assise de uno tenemento is not good for the incertainty, 4 E. 2. Fitzh. Assise, 451. Estovers demanded ought to be shewed particularly; so is it of a Corrody, 11 E. 3. Fitzh. Dower, 85. Dyer, f. 84. 7 E. 6. Pasc. 5 Iac. the Countess of Oxfords Case; and whereas there hath this difference been taken between a Demand of Tithes in gross, and of Tithes appendant, and that Tithes in gross must be particularly demanded, but it is not necessary to demand Tithes appendant particularly, I answer, This is not so, for their appendancy doth not make them not to be demanded particularly, no more than if they were in gross, 18 E. 2. Assise, 377. A Corrody must be particularly demanded, and all the Presidents prove it, and it was so held, Pasc. 8 Car. rot. 271. in Bruer and Drakes case in a writ of Error in this Court, upon a judgement given in Dower in the Common-pleas. A 2d. exception to the Demand of the Dower is this, the Writ of Dower is de manerio de Imber, and the Demand is of Dower in parochia de Imber, and so it is larger than the Writ: for a Parish may comprehend many Mills. Stat. 1 H. 5. C. 5. 22 E. 4. C. 2. Mich. 34 Eliz. rot. 1537. Brad and Bishops Case in the Exchequer, Pasc. 38 Eliz. Bedel and Scarborows Case in an Ejectione firmæ in this Court. It is true, that generally a Parish shall not be intended larger than a Mill, if the contrary do not appear: but here the contrary doth appear by the words of the Demand, which are de rectoria de Imber & Tymesbury infra parochia de Imber, 3, & 4 Philip & Mary, Dyer, Error in a Writ of Error. Return. Summons. Fiction of Law. Statute. Demand. Assise. Parish.

er. 142. and the different penning and expression of the Demand is to be observed: for by that it appears there is a difference between Imber, and the Parish of Imber, Grants, Fitzh. 87. by granting a Mannour with the appurtenances, an Advowson will pass, 19 E. 2. Tit. brief, the Writ abated, for variance between the Writ and the Count. A 4th. Error is to avoid the execution, because of the Error in fait: for the Hundred of Warmister doth extend to Sutton parva which is not named in the Writ, and so the dammages are given for more than is demanded, and it shall not be interpreted by Intendment, and the Hundred is not demanded: for the Will relates to the Land and not to the Hundred, 6 E. 3. 12. 8 Rep. 119. Bonhams Case, and prays Judgement for the Plaintiff in the Writ of Error. Maynard of Councel with the Defendant desired time to argue, and it was granted. Postea.

Grant. Abatement. Variance.

Dammages. Intendment.

Chambers against VVollaston,

Hill. 23 Car. Banc. Reg.

Mich. 22 Car. rot. 21.

CHambers brought an Action of Assault and Battery, and false imprisonment against Wollaston, Wollaston pleads a special Plea of Justification, by vertue of a Custom in the City of London, whereby he had authority to take and imprison him for disturbing an Election of Wardens of a Company, and untill he would promise not to disturb such Elections afterwards. To this Plea the Plaintiff demurs, and takes these Exceptions, 1. The Custom pleaded is against Law, for it appears not that there was any suite depending either by Bill, or Endictment, or otherwise, and so the Custome is against Law, Stat. 25 E. 3. C. 5. 25 E. 3. C. 3. and so was the Petition of Right, 3 Car. And though the Customs of the City of London are confirmed by Statute-law, yet illegal Customs are not confirmed. 2ly. The Judgement is against Law, for by the Judgement no remedy is given for the offence committed to the party against whom it is commited, but only that the offendor shall be imprisoned untill he promise not to disturb Elections again. 3ly. The party committed is not within the Custom by the Defendants own shewing. 4ly. The Custome set forth is not prosecuted: for the commitment is not for the Disturbance, but because the party will not promise not to disturb again. 5ly. The detention of the party in prison is against Law. Hales of Councel with the Defendant, desired time to argue, and the Court desired to have Books.

Demurrer upon the Custom of London pleaded.

Custome.

Judgement.

Holdigh against Chace.

Hill. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 326.

HOldigh brought an Action of Debt against Chace, as an Executor, upon an Obligation made to the Testator. The Defendant pleaded non est factum, and upon this Plea an Issue was joyned, and a special Verdict found; upon which Verdict the Case appeared to be this, The Defendant Chace was

A special Verdict upon Non est factum, pleaded to a Bond.

was bound in an obligation for the payment of a certain sum of mony unto A. B. and to I. S. joyntly. I. S. dyes, A. B. survives, and makes Holdigh his Executor, and dyes, Holdigh brings an Action of Debt in his own name against Chace the Defendant, and declares upon this obligation made to the Testator, and to I. S. and doth not aver that the Testator did survive I. S. The Defendant pleads non est factum, and the question was whether this be a good plea or no, and to prove that it is no good plea, but that it was the deed of the Defendant, the Counsel for the Plaintiff cited these books, 36 H. 6. 4. 35 H. 6. fol. 39. 46 E. 3. 7. 14 E. 1. fol. 4. 18 E. 2. 2. and put this case. Two enfants joyntenants alien, and one dies; The survivor brings a dum fuit infra ætatem, and counts of the Feoffment of one of them, and there the right was adjudged not to be severed by the Feoffement, and so the writ good, and in our case the matter of variance alleged goes to the writ, and not the Action, and it is now too late for the Defendant to take advantage of it, and prayes Judgement for the Plaintiff. Roll Iustice said, the issue is whether it be the Defendants deed or not, and without doubt it is his deed, and therefore let him shew cause why the Plaintiff should not have Iudgement. Plea.

Boone against Sheers.

Hill. 23. Ba. Reg.

Trin. 23 Car. rot. 288.

BOone brought an Action of Debt upon an obligation of 400 l. against Sheers, and declares that the condition of the obligation was, that the Defendant should make such a voyage with a Ship, and pay certain monyes at his return, and other conditions mentioned, and for not performing the conditions he brings his Action. The Defendant pleads in bar that the Ship was taken in the voyage per homines bellicosos, and demands Iudgement of the Action: To this plea the Plaintiff demurred, and shewed for cause that the Plea did not give answer to all the Declaration. Yard of Counsell with the Defendant said, the plea was good; for the plea answers the whole condition of the Bond, which was first to make the voyage with the Ship, and then at his return to perform the other conditions, and being hindred in the one, he was not bound to perform the other. Bacon Iustice, Let us see a book to consider of. Demurrer to a Plea. Plea. Demurrer.

Royston against Mees.

Hill 23 Car. Banc. Reg.

ROyston makes a lease for years of certain lands to I. S rendring rent, the lessee makes his will, and makes Mees the Defendant his Executor, and dyes, the Executor possesseth himself of the remainder of the term of the lands let, and after the rent is behind. Royston brings an Action of Debt against the Defendant, and declares against him for the rent so behind in the debet and detinet, and upon this an issue is joyned, and a verdict for the Plaintiff. The Defendant moves in arrest of Iudgement, and shews for cause that the Declaration is not good, because the Action being an Action of Debt brought against the Defendant, as an Executor, it ought to have been in the detinet, and not in the debet and detinet. But Wild of Counsell Arrest of Iudgement in Debt. Declaration.

cell with the Plaintif argued that the Declaration was good, and the Action well brought in the debet and detinet, and cited Brook title extinguishment 34. and the comment: 526. and said it is an Action founded upon a lease by deed which was made by the Testator, and cited 20 H. 6. 10 H. 7. fol. 50. And that it is the constant form of charging Executors in such cases, 14 H. 4 fol. 29. Fitzh. Tit. responder, 7 E. 6. Dyer 81. 10. rep. 128. And said the verdict hath found it in the debet and detinet which shall be intended to be true, 9 Ed. 4. 41. 17 Jac. Paul and Mordyes Case in the Common pleas, and 7 Iac. Smith and Nicholas Case, and prayes Judgement for the Plaintiff. Hales for the Defendant argued that the Declaration is not good. 1. He said, the Action is good in the detinet, because the profits of the land let, which are over and above the rent to be paid for it, reserved upon the lease, shall be only assets in the Executors hands. 2. It cannot be good both wayes, and the Term is in him as Executor, not the rent, and there is a difference between contracts Executory, and contracts Executed; but it may be said, the rent to be paid may be more than the profits of the land is worth, I answer, this shall not be presumed in law if it be not so shewed. 43 Ass. pl. 23. 16 H 7. fol. 2. The Action is brought for all the rent incurred; therefore it shall not be presumed that the land is not worth the rent that is paid for it: and as for the verdict it shall help nothing; for a verdict shall not supply a necessary part of a Declaration omitted, and if he owes then he detains, and I conceive Hargraves Case to be good Law, though denyed by the Counceil on the other side, and here the privity of the contract is not determined, and so prayes Judgement for the Defendant. Roll Iustice, It is for the advantage of the Executor to bring the Action in the detinet; for then he shall be charged only for the goods of the Testator, and not for his proper goods, and it may be the land is lesse worth than the rent, and that the partyes have consented the Action should be brought in this maner. Bacon Iustice cited Pawls Case Mich. 17 Iac. But entred Pasc. rot. 346. That the Action may be brought in the debet and detinet, and if the Plaintiff will bring his Action here in the detinet it is not for your disadvantage, and he may at his election bring it either way. Roll Iustice, Here the verdict answers the point of the issue, and therefore is good. The Court ruled the Plaintif to take his Iudgement, except better cause shewn to the contrary.

Difference. Contracts.

Verdict.

William against Tyrer.

Hill. 23 Car. Banc. Reg.

Pasc. 23 Car. rot. 224.

Arrest of Iudgement in Covenant.

WIlliam brought an Action of Trover and Conversion against Tyrer for certain goods of the Plaintiff, the Plaintiff hath a verdict, The Defendant moved in arrest of Judgement, and took these exceptions to the Declaration. 1. The Plaintiff declares pro tribus duodenis fili, Anglice dosens of thread, which is incertain; for it may be three dosen pound of thread, or skenes of thread, or ounces of thread. To this it was answered, that it cannot be otherwise expressed, and the words dosens of thread is used amongst Merchants, and well known unto them what is meant by them. 2ly. He declares for so many pounds Muscat. in stead of Nucum Muscatarum, Anglice Nutmegs. But this exception was mistaken, for the record was otherwise. and besides it was with an Anglice which makes it certain. The Court ruled Iudgement to be entred except cause shewed for the Plaintif.

Declaration.

Raw-

Rawſon againſt Bargue.

Hill. 23 Car. Banc. Reg.

The Caſe between Rawſon and Bargue being an Action of Debt upon the Statute of 2 E. 6. for not ſetting forth of Tithes, wherein upon a ſpeciall verdict, the queſtion was whether the Church were a free Chapel given to the King, within the Statute of 1 Ed. 6, was again argued by Latch for the Plaintiff, and by Brown for the Defendant, Latches argument was to this effect. 1. He ſaid, that the Law ſayes it is preſentative although it be not; and 2ly. It is ſufficiently found to be a parochial Church, yet it is not material whether it be found ſo or no. Nere the words of the Statute do not extend to give donatives to the King. 3ly. It is not given to the Crown, and although the Declaration and verdict be that it is a free Chapell, yet it is not comprehended as a Chapel preſentative. Lit. 94. The word free makes a diſtinction of things, and the party ought not to confound things, and a free Chapel is alwayes interpreted for a Church donative, and not preſentative. The right in veſtiture of Churches was challenged from the foundation of them, untill within this 400 years it was altered by the Common law; Seldens Hiſtory of Tithes, fol. 392. and upon that alteration the name of a free Chapel came. Reg. 41. It is ſaid to be free from eccleſiaſticall juriſdiction. Fitz. tit. Brief 6 0. 3 Ed. 3. Fitz. Tit: Ayde du roy 33. 14 H. 4. 11. 22 H. 6. 25. 22 H. 6. 27. by Danbye 26 H. 6. Fitz. grants. 12 Nat. brev. 33 E. 34. f. 27 E. 3. 84. Cowels interpretor, Tit. free Chapel. And in all Statutes the word free Chapel is meant of donatives. Stat. 26 H. 8. cap. 3. Stat. 37 H. 8. cap. 4. Stat. 1 Ed. 6. cap. 14. Regiſt. 307. But it is objected that free Chapels extend to preſentatives, becauſe they are with cure, Lit. Com. 344. a donative may be parochial, 7 E. 3. f. 4: To this I anſwer, Churches had cure of ſouls, when they were donatives. To the 2d. point, by the meaning of the Statute it appears, that only donatives were intended, as the preamble of it doth declare; And all Chapels are held in Frank almoigne as well as donatives, and ſo all may be given to the King by the ſame reaſon. Another objection is that the word Capella is ſuperſtitious, and therefore being of a ſuperſtitious foundation it is given to the King, and Cowels Interpretor is urged to prove the word to be ſo derived, To this I anſwer, that Sir Henry Spelman as learned an Author as Cowell, in his gloſſary rejects Cowells derivation of the word Capella, and ſaith that Capella is uſed promiſcuouſly for any upper covering; And though the name were ſuperſtitious, yet that makes not the Chapel to be ſo; for ſo the Church of St. Andrew, or St. Dunſtan, ſhould be ſuperſtitious, and given to the King by the Statute. There is a double preamble of the Statute, 1. A recitall of another Statute, and the taking away of other ſuperſtitious uſes. Preamble of the Statute, 37 H. 8. 22 Ed 4. cap. 7. 8. rep. 137. beaſts of the Foreſt are not Cattel, 3. rep. The marques of Wincheſters Caſe, Com. 204. That ſome generals may be taken in a reſtrained ſence, 9 H. 6. 36. Words of a Statute ought not to be interpreted to deſtroy naturall Juſtice. The ſtile alſo of the Act doth not ſhew that donatives are only intended, and the Crown hath not granted this away, 37 H. 8. and ſo not deſtroyed them. Donatives uſually paſſe as lay fees, and the paſsing of them as lay fees alters not the nature of the Chapells, and the Statute gives it to the King as the incumbent had it, and there

2 Arguments whether a free Chapel or no, and the Iudges opinions.

Free Chapel.

Preſentation.

Donative.

Tenure.

Frank-almoigne.

Preamble.

Interpretation.

Lay fee.

there is a saving of the nature of it in the Statute. It is objected, that he hath not been presented ratione lapsus. To this Hob. 337. in Greens Case gives an answer, and Potters Case 9 Car. in the Common pleas. and it is well found here in the verdict for the Plaintiff, That it is not within the Statute. Brown for the Defendant in his argument said, the question is whether it be a free Chapel, given by the Statute of 1 Ed. 6. and 1. It is within the words of the Statute; and 2ly. It is within the meaning of the Statute; for the words they are simplicitur generalia, and so large as can be, and all Chapels are given by them, and none excepted. And here 1. The nature of a free Chapell is to be considered; For Cowel he is not fit to be cited, for his book was condemned by Parliament, and burnt as erroneous, and scandalous, in 4 E. 3. 28. Peeter Corbets Case, a Chapel is part of a Church, 8 H. 6 32. 37. Bracton 241. 17 Ed. 3. 58. 9 Ed. 3. 11. these are not within the Statute of 1 Ed. 6. 2ly. There is Capella parochialis which is subject to the jurisdiction of the Ordinary, 14 E. 3. Fitz. quare impedit 183. Lynwood 142. 8 Ed. 3 60. The book of entryes 542. Long quinto 26. 3ly. A Chauntry is taken for a Chapel. 4ly. A free Chapel is nomen comprehensivum, and comprehends much, 13 Ass. pl. 2. 15. Ass. pl. 8. The essential matter of a free Chapel is to be free from ordinary jurisdiction, and not to be visited by the Ordinary, and one comes regularly to a free Chapel by donation, but being in, he is free from ordinary jurisdiction, 18 E. 3. Fitz. scire fac. 11. 17 E. 3. f. 45. Brook præmun. 21. It hath been objected that it is presentative, and so it is not free; I answer it may be free though it be presentative, and so the verdict finds it to be in the foundation of it. 2ly The Plaintiff brings the Action as Rector of a free Chapel, and now he shall not be suffered to deny his own Declaration. 3ly. The admission, institution, and induction implyes jurisdiction till the contrary appear, viz. that it is a free Chapel notwithstanding it be presentative, 16 E. 3. Fitz. brief 660. None but the King can found a free Chapel, and although it be free by prescription, yet it shall be intended to be at first so founded. Institut. 44. 9 H. 6. f. 17. 20 E. 3. 56. The King by foundation of a free Chapel, may grant that it shall be presentative, and yet when the party is in, that it shall be free from the jurisdiction of the Ordinary. Fitz. nat. br. 48, C. The dean of Battel in Sussex is presentative to the Vicarage of Battel by the Bishop of Chichester; but when he is in, he is free from the jurisdiction of the Ordinary. Davyes Rep. fo. 72. Cooks instit. 344. A lapse may incur of a free Chapel by the foundation of a free Chapel, 33 E. 3. fol. 3. 17 E. 3. fol. 51. 17 E. 3. fol 12. The foundation of a thing may alter the law, 7 E. 3. fo. 18. The old book 316. The essential difference of a free Chapel from another, is to be free and exempt from the jurisdiction of the Ordinary, 17 E. 3. close roll in the Tower. Seldens book of tithes 441. regist. 40, 41. Pasc. 3. Jac. in this Court Fachell and Gaires Case. There are divers writs in our books to discharge free Chapels from visitations, and therefore it appears they are exempt from the Ordinaries jurisdiction. But it is objected that the presentation makes it presentative, though it were not so before. This is answered, 14 E. Fitz. 9 E. 31. 27 E. 3. 34. It is not the presentation made by the party, but the foundation that makes it presentative. 2ly. It is objected that it is parochial, and therefore is not free; I answer, it is not so found although it be so claimed, and though it be so claimed it makes nothing to the purpose. The parish Church of St. Maryes in Shrewsbury was parochial, and yet given to the King by this Statute, 13 H. 4. Fitz. brev. 807. Hil. 17. Iac. in this Court in Grubbam and Gales Case adjudged, that a Chapel may be founded in a parish Church, and such are given to the King, Dyer 267. 0 Car. Pasc. in the Common pleas Rawlins and Yaxlyes Case. 2ly. For the words of the Statute this is not one of the free Chapels excepted in the Statute, and therefore it is within

Cowels Book.

Divers sorts of Chapels.

Foundation.

Jurisdiction.

in the Statute, and there appears no diſtinction in the verdict found, and exceptio in non exceptis format regulam. For the meaning of the Stat. Brook prebend. 2 d. 10. rep. 128. All parts of a Statute ought to ſtand together if it may be, and one part of it ought not to deſtroy another part, generale dictum generaliter eſt intelligendum; The exceptions of the Statute ſhew the meaning of it. It is objected, that the being a free Chapel makes it not to be ſuperſtitious, I anſwer, if it be a free Chapel by Common intendment it is ſuperſtitious, but though it it be not, yet it is given by the name of a free Chapel. By the verdict it was taken for a free Chapel, and that it was ſeiſed into the Kings hands. There is much light to be had in interpretation of laws, by conſulting with thoſe that made them, and to know how they had interpreted them; for expoſitio contemporanea eſt optima. Plow. 466. Paſc. 35 El. Clark and Mark in the Common pleas. If it be not a free Chapel, yet being found ſo, it ſhall be taken to be ſo in reputation, and enough to give it to the Crown: And the preſentation to it is ad rectoriam ſive liberam capellam, and ſo not certain, and ſo it is not a good preſentation, becauſe the King was not rightly enformed what it was he preſented to, Regiſt. fol. 203. 19 E. 3 Fitz. quar. imped. 360. and ſo prayes Judgement for the Plaintiff. Roll Iuſtice, There is a difference where a Chapell is founded within a Church, and where the Chapel is Parochial. Bacon Iuſtice held, that it was given to the King by the Statute; for it is found to be a Chapel paying tenthes, and this Statute looks backward to the Statute of 37 H. 8. and to things in being, and the Chapel was within that Statute, and by it he might have ſeiſed it, and it is within the words, and intent alſo of the Statute of 1 Ed. 6. and the proviſo of the Statute ſhews the meaning of it, and Capellæ dependentes. or Chapels of eaſe are not given by the Statute. Roll Iuſtice to the ſame effect, and ſaid, This Statute of 1 Ed. 6. was made to ſupply ſomething omitted in the Statute of 37 H. 8. and it is plain, that it is within the words, and we have no warrant to interpret it otherwiſe, ſince it doth not appear that it is excepted; alſo it is not found to be a Pariſh Church, but that they claim it to be ſo, and if it were it would not help. aly. It may be preſentative, and yet a free Chapel according to the foundation, and endowment of it, and a free Chapel, may become a Church by preſentation of the Patron, but it appears not to be ſo to us. The proviſo of the Statute ſhews that it was not the intent of the Statute, to exempt all free Chapels, but thoſe only which are named, and no more: And the intent of the Statute was that the King ſhall have it as a lay thing, and he was not compelled to preſent. and here the Patron hath taken the profits, and there are no inhabitants within the Pariſh, for the ſeignory compriſeth all the pariſh, and if the King preſents by lapſe where he ought to do it pleno jure, the preſentation is not good. For theſe reaſons, The Iudgement was given for the Defendant, if better matter be not ſhewn before the end of the Term.

Interpretation

Reputation.

Preſentation

Fulham.

Hill 23 Car. Banc. Reg.

For Execution notwithſtanding a writ of Error brought in parliament.

Fulham had a Iudgement in this Court againſt 3 Defendants, two of the Defendants bring a writ of Error in Parliament. Fulham that had the Iudgment moves the Court, he may have Execution upon his judgment not-with-

withſtanding the Writ of Error brought in Parliament, becauſe the Record is not well removed, for the Writ of Error is not good, for the Judgement is againſt three, and the Writ of Error mentions but two of them. Roll Iuſtice, I doubt you cannot have execution, but the Writ of Error muſt be abated in Parliament, and then you may come here and move for execution, for now it is not ſafe to grant it. Move it in Parliament to have it abated, or move here again at your own adventure.

Abatement.
Execution.

The King and Holland.

Hill. 23 Car. Banc. Reg.

In this Caſe between the King and Holland, after divers arguments at the Bar, and the opinion of the Court delivered, The Court was moved for an Amoveas manum to the Chancery, that the party may have his Land out of the Kings hand. The Court anſwered, The Judgement is to be given here, if there be cauſe for the King, if not againſt him, and you ought not to go to the Chancery. And all that we can ſay is, that the King ſhall not have Iudgement.

For an Amoveas manum to the Chancery.
Amoveas manum.
Iudgement.

Hill. 23 Car. Banc. Reg.

The Court was moved to quaſh an Endictment of forcible Entry upon theſe Exceptions. 1. That it did not ſay, that the forcible Entry was contra Coronam & dignitatem, but this the Court over-ruled. A ſecond exception was, That it doth not ſhew that the party was ſeiſed at the time untill the Defendant entred by force upon him. 3ly. The Endictment concludes, contra formam Statuti, and it ought to be Statutorum, for the Statute of 8 H. 6. upon which this Endictment is framed, relates to other Statutes. To this the Court ſaid, if the Endictment be ſo it is ill. 4ly. The Endictment ſaith, he entred peaceably and detained with force, and ſuch an Endictment hath relation to two Statutes. To this it was anſwered, that the Statute of 8 H. 6. is ſufficient to found the Endictment without relation to other Statutes, for this clauſe upon which this Endictment is framed, is a new Law, and hath no relation to precedent Statutes, for it is here only for a forcible detayner. Roll Juſtice doubted of this, for it is ſaid, that the Statute of 8 H. 6. ſhall be added to the new Statute. Bacon Iuſtice differed in opinion and ſaid, the Statute of 8 H. 6. was not made to piece up the other Statute, but is a new Law as to this clauſe. The Court will adviſe further.

For quaſhing an Endictment.
Endictment.

Chambers againſt VVollaſton.

Hill. 23 Car. Banc. Reg.

This Caſe was again moved and argued by Ward of Councel with the Plaintiff. The Action was an Action of Aſſault and Battery, and falſe impriſonment, The Defendant pleaded a ſpecial Juſtification by vertue of the Cuſtom of the City; To which Plea the Plaintiff demurred, for

Argument upon a ſpecial Plea.

six points were spoken to by the Plaintiffs Councel in his Argument. 1. He said, the proceedings against Chambers were neither agreeable to the Common law, nor to Magna Charta, and therefore illegal, and not warrantable, notwithstanding the Custome pleaded to back them. 2ly. The Custome it self is not well pursued, Bracton, 55. 5 Rep. 64. The King cannot grant power to a Court to commit against the Common-law, or Statute-law, Magna Charta, 54. 43 Ass. Pl. 5. and though one submit himself to be committed, for a thing for which he is not committable by Law, this submission is void. 3ly. The Custom pleaded is against Magna Charta, and divers other Statutes, Stat. 9 H. 6. cap. 5. 8 E. 3. Cooks Magn. Chart. f. 16. Bracton, 334, 335. 43 E. 4. f. 32. and it appears not the pleadings were in Latin, as they ought to be, 36 E. 3. neither was the Confession legal, nor entred upon Record. 3ly. The Judgement varies from all other Judgements in Law: for the Commitment was, that he should stand committed untill he would promise that he will disturb no more; And 2ly. untill the Court should take further order, and this is against Law, 8 Rep. f. 59. 2 Instit. 52. 5ly. The Statute of Rich. 3d. confirms not the Custom, for if it was before Magna Charta it is taken away by that Statute, for it is not excepted in it, Magna Charta cap. 19, 29. Miror of Iustice, cap. 5. Long Quint. 40, 41. 6ly. The Custom is not well pursued in the Return, for the Oath extends to be obedient to the Bayliff, &c. for the time being, but the Return is not so: but it said, that he be obedient to good Laws, and this is not in the Oath. And the Return is against their Custom, and Judgement for the Commitment, and so he prayd Judgement for the Plaintiff. Roll Iustice said, That the Judgement and the Return are contrary: for the Judgement was, that he shall be committed, because he would not promise, not to disturb: and the Return is, that he promise that he will not disturb. Cause was to be shewn why the Plaintiff should not have Iudgement.

Custome. Submission. Pleadings. Judgement. Return.

The King and Apsley.

Hill. 23 Car. Banc. Rep.

APsley removed certain orders made against him by the Commissioners of Sewers for Westminster, by a Certiorari into this Court. And upon the Return these exceptions were taken. 1. That it doth not say the Commission of Sewers was under the Great Seal, as it ought to express, 7 Car. Allen and Carter, & 5 Car. Rayl and Mannings Case, and Pasc. 14 Car. Hungates Case, and because it is not so set forth there can no Issue be taken, whether they be Commissioners or not. 2ly. The Commission is not well pleaded, for it appears not that three of them were of the quorum, as the Statute appoints there should be. 3ly. The Return is in English, and it ought to be in Latin. But to this Roll Iustice answered, That the Return is good notwithstanding, for the Commission is in English. 4ly. It doth not appear, that Harts-horn lane, touching which their orders were made is within VVestminster, and so it cannot be well known, whether it was within their power, by vertue of their Commission to make any orders touching that place. Hales of Councel for the Commissioners moved, the Return might be amended. But the Court answered, It could not be, because the Return was made the Term before. And it was ordered, that cause should be shewn Tuesday following, why the Return and Proceedings should not be quashed.

To quash orders of Commissioners of Sewers. Return. Amendment.

The King againſt Page and Harwood.

Hill. 23 Car Banc. Reg.

Queſtion upon the Statute of Stabbing, whether Principle or Acceſſory. Principle. Acceſſory.

THree men were endicted at an Aſsiſes in the Country for Felony, for killing of a man, the Endictment was framed upon the Statute of 1 Iac. made againſt Stabbing; They were all found guilty. He that did the fact was condemned, and executed: but becauſe the Juſtice of Aſsiſe doubted whether the other two were Principles within that Statute, or but Acceſſories, they would not proceed to Judgement againſt them; Whereupon they were brought to this Bar to be proceeded againſt for the Felony, and the doubt was, in regard they were only preſent, and abetting the perſon that did the fact, and uſed no Action towards the death of the party, whether they were Principles within the Statute, or but Acceſſories. Roll Juſtice ſaid,

Clergy.

They are not Principles, but Acceſſories, and ought to have their Clergy: for the Statute of Stabbing being a penal Law, it ſhall be taken ſtrictly and not extended to equity, and in Swinertons caſe Bramſton, Barkley, and Iones, three of the Judges of this Court directed the Jury, the Caſe being of the ſame nature with this, to find the parties only acceſſory. But the Jury in our Caſe have found them guilty as Principles, and I doubt upon that,

Tryal.

whether the Tryal be good or no. Walker of Counſel againſt the Priſoners ſaid, the Statute of Stabbing makes no new offence, and therefore it is

End ſtment.

doubtfull, whether it be neceſſary for the Endictment to conclude contra formam Statuti Roll Iuſtice ſaid, it ought to be ſo. But Bacon Iuſtice doubted. The Court admitted the Priſoners to their Clergy, and they were burnt in the hand in view of the Court by the Hangman of London, and the Priſoners bound each for the other to their good behaviours, and to appear in Court the next Term.

Hales againſt More.

Hill. 23 Car. Banc. Reg.

Mich. 23 Car. rot. 382.

Error upon a Iudgement in Deb. Demand. Venire.

A Iudgement was given in an inferiour Court in an Action of Debt, and a Writ of Error brought in this Court to reverſe it. The Errors aſsigned were, 1. The plaint is entred generally de placito debiti, which is uncertain, ſo that the Defendant cannot know what is demanded. 2ly. In the awarding of the Venire, it is duodecim, &c. and doth not ſay probos & legales homines. Bacon Iuſtice, Duodecim in the Venire, with an &c. is not good in an Inferiour Court, but this is in the awarding of the Venire, and therefore well enough, but the firſt is a good Exception in my Judgement. Therefore let the judgement be reverſed, except cauſe ſhewn to the contrary.

The King and Corye.

To be reſtored to a Recorders place.

A Writ of Reſtitution iſſued out of this Court for one Corye to be reſtored to the Recorders place of the City of Norwitch, which was returned and filed. Hales of his Counſel opened the Return and cited

Stroods

Stroods Case, that one ought not to be removed from any office without shewing good cause why he is removed, which is not here done, but only a Custom set forth, whereby they shew they had authority to elect a Recorder for a year only, and at the end of the year to elect another, and that by vertue of this Custom, they had chosen another Recorder in the parties place, he having been in a whole year, which he conceived to be an ill Custom. Roll Iustice said, If this be a void Custom, none of the two Recorders were well elected, and so Cory cannot be restored And Bacon Iustice did also doubt, whether any of them were well chosen. It was said, that the Return is not traversable, but shall be taken to be true. Bacon Iustice held, That the Return was not good, and you must have an Alias, that we may have a better Answer before us: for nothing can be done upon this. But the Court enclined, that a Recorder may be elected for one year. It was said, If a Custom be entire you cannot make one part of it good, and another part of it ill. The rule was, for the party to take an Alias, because this Return is not good, and it is too late to amend it, because it is filed.

Custome.

Traverse. Return.

Amendment.

The King and Symmons.

In an Endictment of forcible Entry upon the Statute of 8 H. 6. divers Exceptions were formerly taken. Roll Iustice answered to that, that the Endictment did not say, contra Coronam & dignitatem, it was well enough without those words. Another exception was now taken, that the Endictment is ad tunc & ibidem, which is repugnant. This Roll Iustice over-ruled, but he doubted whether the Endictment ought to be contra formam Statutorum, or contra formam Statuti as it is, because this Endictment is framed upon divers Statutes. Bacon Iustice cited the 4th. Rep. the Case of Appeals, and said, it is good as it is contra formam Statuti, and said, that a forcible Entry and Detayner is punishable at the Common-law. Court desired to see Presidents. Antea.

To quash an Endictment upon the Statute of 8 H. 6.

The Common law.

Hill. 23 Car. Banc. Reg.

Maynard shews for cause why a Prohibition should not be granted to the Admiralty, That the parties have moved this matter in the Common-pleas, and did there joyn issue upon the same, and a verdict passed against the Prohibition, and a consultation was thereupon granted. The Councel on the other side makes another suggestion, viz. that the sentence in the Court of Admiralty, was against a person that was dead, and that one of the parties who had the sentence had released. To this the Court said, you might have pleaded this in the Admiral Court. Hill of Councel for the Prohibition said, it is not material what the parties have done in the Common-pleas, for this Court is not bound by it. Roll Iustice, If the matter of your surmise here be tryed already in the Common-pleas, why should you move here upon the same surmise. But it is not arbitrary to grant a Prohibition or not to grant it, if there be cause to grant it, and the Tryal in the Common-pleas is no conclusion to us, and if it be mischievous as is objected, to grant a Prohibition after a Consultation granted, the Parliament may make a Law to prevent that mischief, for as the Law now is it may be done; Yet we will advise.

For a Prohibition notwithstanding a Consultation granted.

Surmise.

Arbitrary.

Conclusion.

Prohibition.

Gawdy

Gaudy againſt Ingham.

Hill. 23 Car. Banc. Reg.

Error upon a Judgement againſt an adminiſtrator. Judgement.

IUdgement was given againſt an Adminiſtrator in an Action of Debt brought againſt him, in the Common pleas, upon fully adminiſtred pleaded, and a writ of Error was here brought to reverſe the Judgment. The Error aſsigned was, that Judgement was given for the whole Debt, whereas the verdict found that the Defendant had aſsets only to diſcharge a part of it. To this the Court ſaid, if it be found he have any aſsets, Judgement muſt be given againſt him, for the whole debt upon his falſe plea, but if he have no aſsets it is otherwiſe

Allen againſt Reeve

Hill. 23 Car. Banc. Reg.

Mich. 23 Car. rot. 88.

Arreſt of Judgement in an Action of Covenant.

ALlen brings an Action of Covenant againſt Reeve, and his wife, upon a leaſe expired made of certain houſes by deed unto the wife dum ſola fuit, wherein was a Covenant to keep the houſes in repair during the term, & for breach of this Covenant is the Action brought, and declares as to one of the houſes that it was burnt by negligence. The Defendants plead a ſpecial plea to this effect; That the houſe which was burnt was not burnt by negligence, nor with Common fire as the Plaintiff hath declared, and as to the reſt they plead the general iſſue, that they were in good repair at the expiration of the term; the Plaintiff hath a verdict. Nicholes of Counſel with the Plaintiff ſaid, it conteins a negative preignans; for there are two matters offred in iſſue, one that the houſe was not burned by common fire. 2ly. That it was not burned by the negligence of the party. Roll Iuſtice, If it be a negative preignans, as you ſay it is, you ought to have demurred unto it as to a double plea. But let us ſee the book, and ſtay in the mean time.

In arreſt of Judgement.

Negative preignans. Demurrer.

Hobſon againſt Heywood.

Hill. 23 Car. Banc. Reg.

Trin. rot. 791.

Error to reverſe a Judgement in Briſtow in an action of Debt. Error.

HObſon brings a writ of Error in this Court to reverſe a Judgement given againſt him at Briſtow in an Action of Debt for rent, and aſsigns for errors, that the ſum demanded to be due for rent was in figures, and not in words, as it ought to be. 2ly. It is ſaid, that the Jury Aſſideint damna for Aſſident damna. The Court held they were both material exceptions, and reverſed the Judgement, except cauſe ſhould be ſhewn to the contrary Saturday following.

Cham-

Chambers against Floyd.

Hill. 23 Car. Banc. Reg.

Upon a rule on the Crown side to shew cause why an Attatchment should not issue out against two Justices of peace for not allowing a certiorari directed to them out of this Court to remove an endictment of forceible entry taken at a private Sessions before them. The Councel for the Justices urged, that they had not contemned the Processe of this Court as is surmised; for the certiorari ought to have been delivered in open Sessions of the peace, and there allowed; but this was delivered at a privat Sessions, and so they were not to allow it. 2ly. The party who procures the certiorari, ought according to the Statute, to put in security, at the delivery thereof, to prosecute, or else it is not to be allowed, but that was not done here, and therefore they were not bound to allow it: And the certiorari is to remove an Endictment of forcible entry; but the return is that it was a peaceable entry, and a forcible detayner, so that there being no such Endictment before them as the certiorari mentions, they could not make a return according to the writ, and therefore it is no contempt in the Justices not to make a return. The Court, answered, that it is the usual course of the Court to make certioraries in this form, and therefore this is no excuse; The Councel against the Justices urged, that this case is within the Statute, though it were at a privat Sessions of the peace, and therefore the Justices are in contempt. Roll Iustice said, I conceive that this is casus omissus not provided for by the Statute, and if so, then are they not in contempt, and if some Justices take an Endictment of forcible entry, other Justices cannot give restitution upon this Endictment. Bacon Iustice, The Statute is a remedial Law, and made for the ease of the subject, and ought not to be construed strictly: And said, that a privat Sessions is a Sessions; but security ough to be put in at the quarter Sessions, for it shall be intended that all the Justices of the County are there. Roll Iustice said, that a privat Sessions ought to take security, and the Endictment ought to be returned there; but the certiorari is not good, for it mentions not the title of the Act, yet the generall practice of the Court seems to warrant it as it is. The Court ordered the party to have restitution, and the contempt to be spared by consent of partyes, if cause not shewn to the contrary before the end of the Term.

Cause against allowing of an attatchment.
Allowance.
Certiorari.
Return.
Contempt.
Casus omissus,
Restitution.
Construction.
Security.

Hill. 23 Car. Banc. Reg.

The Court was moved upon an Affidavit for a prohibition to the Court at Doncaster, and for an attatchment against the Major for refusing to allow of a forein plea, tendred by the Defendant in an Action of Debt brought against him for rent for lands, that lye out of the jurisdiction of the Court, and for proceeding against him notwithstanding the tender of the plea. The prohibition and attatchment were granted if cause not shewn to the contrary before the end of the Term.

For a prohibition to the court at Doncaster.
Prohibition.
Attatchment.

David againſt Lyſter.

Hill. 23 Car. Banc. Reg.

For the Defendant to plead an iſſuable plea.

THe Court was moved by the Plaintiff that the Defendant might be ordered to plead an iſſuable plea, which he had not done, for the Action is an Action of ejectione firmæ in which the Plaintiff hath declared, and the Defendant hath emparled, and after emparlance he pleads that the lands are antient demean, which is a dilatory plea. Roll Iuſtice, It is a good plea after imparlance, for it goes in bar of the Action it ſelf, and not, in abatement of the Writ.

Plea.

The King and Holland.

Hill. 23 Car. Banc. Reg.

Opinion of the Court for reſtitution in this Court & not in Chancery.

ROll Iuſtice ſaid, that in this caſe formerly argued, reſtitution ought to be given to the party, for the ſame Iudgement ſhall be given here which ſhould be given in Chancery, and all the Record is here before us, and they in Chancery cannot do any thing in the cauſe, for they have nothing before them. And it appears to us that the Declaration was inſufficient, and ſo we cannot give Iudgement for the Plaintiff; but againſt him, notwithſtanding the inquiſition found for the King. Therefore let the party have reſtitution, except cauſe ſhewed the firſt Friday in the next Term.

Iudgement. Reſtitution.

Hill. 23 Car. Banc. Reg.

For diſcharge of a priſoner.

THe Court was moved to diſcharge a priſoner brought to the Bar, by a habeas Corpus committed by the Committee of plundred Miniſters, and theſe exceptions were taken to the return. 1. There is no time expreſſed how long the party ſhall ſtand committed, ſo he is committed without limitation of time, which is not legall. 2ly. He is committed by the name of Mr. Smith, and his name of baptiſm is omitted, which ought not to be. Vpon theſe exceptions the Court held the commitment illegal, and diſcharged the party.

Commitment.

Weekes and VVeekes.

Hill. 23 Car. Banc. Reg.

Againſt a return of orders of commiſſioners of Sewers

VPon the return of a certiorari to remove orders made by Commiſſioners of Sewers, It was moved that the return was not good, becauſe it was not made by the partyes to whom the certiorari was directed, for it was directed to the Commiſſioners, and the return is made by the Clark of the Sewers. But the Court ſaid the return was good enough, for all the returns are ſo, and the Clark is an officer of whom the Law takes notice of, and it belongs to him to do it.

Return. Notice.

Paſs.

Pasc. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an inferiour court in an Action upon the case, and the Error assigned was that the habeas corpus was not well returned, for it is not returned to be in omnibus servitum et executum as it ought to be, and as the usual form is. Maynard of Councel against the Writ of Error argued, that it was well returned notwithstanding those words were omitted, because the Jury did appear full, and no issues were lost, and the Jury have day by the roll, 3 H. 7. 14. per Hussey, and 9 E. 4. 14. it is made a question but not resolved. 2ly. Though it be a Slip yet it is within the Statute of 21. Iac. and is helped by it, for that Statute extends to more than Writs, as may appear by the Statute, and the Statute of 18 Eliz. touching original Writs extends to faults of bills, although original Writs are only named, for a bill is the same in substance with a Writ, so here the Writ, and precept are of the same substance. 3ly. it is the intent of the Statute, and the Statute shall be taken by equity, Hill. 13. Iac. in this Court in Gregory and Brookes case, this question was stirred but not resolved, and Hobart denyes the 5th. report f. 61. to be Law, and there is no proceedings properly in superiour Courts by plaint. Roll Justice, The Statute extends not to point of equity in inferior Courts, for their proceedings are not so regular, as the proceedings in the high Courts here at Westminster, but they are by short notes. Bring us books and move it again.

Error to reverse a Judgement in an inferior court in an Action upon the case.
Return.
Day in court.
Bill.
Original writ.
receipt.

Creswell against Ventryes.

Pasc. 24 Car. Banc. Reg.

CReswell brought an Action upon the case against Ventryes for speaking these words of him; Thou didst, and dost receive thief stollen goods, witnesse a feather bed tick in thy house, and the cloath which thy mans suit was made of, and thou knewest they were stollen. The Plaintiff hath a verdict, the Defendant moves in arrest of Judgement that the words are not actionable, for one may receive stollen goods, and yet not be guilty of Felony. Bacon Justice, The receiving of stollen goods is not felony; but the receiving, and comforting of the Felon is Felony. The Judgement was stayed till the other should move.

Arrest of Judgment in an action upon the Case for words.
Felony.

Thynn against Thynn.

Pasc. 24 Car. Banc. Reg.

THynn brings an Action against Thynn to reverse a Judgement given in the Common pleas in a Writ of Dowr; Hales of Councel with the Defendant in the Writ of Dowr in answer to the exceptions formerly taken said, that the summons was well enough returned as it is, because it was made upon some part of the land within the Visl, Long quint. E. 4. 2 H. 4. 13. 39. E. 3. 7. 2ly. It is not necessary to make the Proclamation, where the summons is, for the Statute intends not to alter the course of the summons,

Error to reverse a Judgement in Dowr
Summans.
proclamation

mons. 2ly. The words of the Statute are satisfied, for the actual summons in one Mill is a summons in the other Mills. 3ly. The meaning of the Statute is satisfied, and the mischef intended to be satisfied by the Statute,

Demand. Hob. 173. Allen and Walkers Case. For the 2d. exception to the Demand he held it good enough, for in a Writ of Dower in Demand needeth not to be so particular as in other Writs, so is it in an Assise, 11 E. 3. 18. 43 E. 3. 6. 3 Ed. 2. Dower, 161. and the reason is, because the Wife demands not the whole Land, nor can have the Charters which concern the Land to enable her to make so precise a Demand as may be in other Writs. And as to Harpers Case that is objected, I answer, it agrées not with our Case, Regist. f. 36. 16 E. 3 Fitzh. Quar. Imp. 147. and it is certain enough, because it is of a Rectory, and not of Tithes in gross. 3ly. The demand of Tithes is surplusage, and it is all one as to say, the Rectory cum pertinentiis. Then as to the Objection that one thing is twice demanded, I answer, it is not so, but demanded as part of a thing demanded in the Writ, and a

Abatement. Demand in a Writ of Dower shall not abate the Writ, though one thing be

Dammages. twice demanded, for dammages shall not be twice recovered, 4 E. 3. f. 52. Mich. 9 Iac. in the Common-pleas agreed so by the whole Court; In Bluets Case, 8 Car. one thing was twice demanded, and yet the Writ was not abated. To the 3d. exception, That the Demand is more large than the Writ, because a Parish may be larger than a Mill, and the Demand is the Parish of Imber, I answer, That the Mill and Parish shall be intended to be of the same extent, if the contrary do not appear, Cooks lit. f. 125. 2ly. Although the Parish may be larger than the Mill, yet it may lye in the Mill, and the contrary doth not here appear, and the Case is so, that it is impossible that the Parish should extend into another Mill, 1. The office of the Writ is to restrain the Demand, and the Writ ascertains the Demand, 19 E. 3. Fitz. Dower, 95. 9 E. 4. f. 16. by Chock. 2ly. There is a restriction within the body of the Demand, for the Demand refers to the Writ, and is bounded by it, 42 Eliz. Wook and Godins Case, a small im-

Implication. plication will make a Mill and Parish to be all one, and so it is here, 42, 43 Eliz. Com. Banc. Hob. 12. Case Brook and Spencer, Trin. 16 Iac. in this Court, rot. 504. Marks and Marks. And as to the Exception taken to the

Execution. execution, that dammages are given for more than is demanded, 1. There is no confession as it is supposed on the other side, that the Hundred in demand doth lye in another Mill. 2ly. It is impossible for dammages to be given for more of the Hundred than lyes within the Mills mentioned in the Writ, and so are there no dammages given for that part of the Hundred which lyes in Sutton parva, as is objected on the other side: for no more shall be recovered than is contained in the Writ, 9 E. 4. 6, 16, 17. The Question there was, whether it were a Plea to the Writ, 17 E. 3. f. 44. The Court desired to hear another Argument.

Castle against Dinely,

Pasc. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1078.

Error to reverse a Judgment in an a&on upon the Case. CAstle brings a Writ of Error to reverse a Judgement given against him in the Court at Owse-bridge in York, in an Action upon the Case upon an Assumpsit; The Error assigned was, that the day of the Month in which the promise was made is in Figures. To this the Counsel on the other

other side said, that heretofore it had been held to be Error, but now since the Statute of Ieofailes after a verdict is no Error. But I. Turner of Counsel with the Plaintiff in the Writ of Error said, That it is a material exception now: for the Assumpsit is the ground of the Action, and therefore the day must needs be material. Another exception was, that the Venire was Venire facias duodecem, &c. de Baliva tua, and the Venu was in the City of York. But to this exception it was answered, that the Record is de Civitate Eborum in Baliva tua, and so it is well enough and of this opinion was the Court. But the Court held the first Exception to be good; Whereupon the Counsel for the Defendant in the Writ of Error prayed, the Iudgement might be reversed for his Clyents dispatch, and so it was. Error.

The King against Andrews.

Pasc. 24 Car. Banc. Reg.

ANdrews was endicted for Murther, and out-lawed upon the Endictment, and taken upon the Out lawry, and brought to the Bar, and demanded what he could say, why Iudgement should not be given against him; The Prisoner said, he had brought his Writ of Error to reverse the Out-lawry, and prayed it might be allowed, which was granted, and the Writ read by Broughton the Secondary on the Crown-side. The Prisoner desired he might have Walker, Hales, and Pepes, assigned him for his Counsel, which the Court granted. The Counsel prayed they might have a Copy of the Record. Roll Iustice said, that the Prisoner himself ought to shew matter in Law for Error, which the Counsel doubted. But the Court overruled it, yet agreed, that the Record should be read unto them, which was done; Upon the reading Walker took these exceptions. 1. The Process is not well awarded, for the Capias is not præsict. Andrews, and so it appears not who was out-lawed, whether the Prisoner or another of the same name. 2ly. It is not said, that the Process is awarded by the Court, nor at what Sessions it was awarded. Roll Iustice, It is not necessary, for it is recorded there. 3ly. It appears not what party is dead, whether he that was struck or another. 4ly. It doth not appear in what part of the body the Wound was given, nor with what weapon. The Court said, that they will hear the Kings Counsel before they would conclude any thing. The Counsel moved, that the Prisoner might be bayled, because it was fourteen years ago since he was endicted. The Court answered, till you are assigned of Counsel upon Record, we cannot bayl him at your prayer. Then the Counsel desired a Copy of the Record, ad quod non fuit responsum, but the Court said to the Counsel take more time to consider of other Exceptions, for if these shall be over-ruled your Clyent is gone, viz. must be hanged. At another day he was bayled by four persons, and bound to prosecute his Writ of Error with effect. Arraignment upon an Out-lawry for Murder. Error. Bayl.

Pasc. 24 Car. Banc. Reg.

AN Action of Debt was brought upon an Obligation for 3000 l. the Defendant pleads that he had paid the mony on such a day, whereas the truth of the Case was, that there was two dates of payment limited in the Obligation, and the Defendant had paid part of the monies upon one of the Arrest of Iudgement in Debt upon an Obligation.

dates of payment, and the rest upon the other day, and not all at one day. The Plaintiff replies that the Defendant did not pay the mony upon the day alleged by the Defendant in his Plea, and upon this an Issue is joyned,
Verdict. and a verdict found for the Plaintiff; the Defendant moves in arrest of Judgement, and shews for cause, That the Verdict is imperfect, because it doth not find that the Defendant had two dates of payment, but concludes that he did not pay the mony upon one of the dates. Roll Justice, If you have two dates of payment to plead, and you rely upon one day in your pleading, and Issue is joyned upon that, and it be found against you, you must
Champerty. be barred by it. Hales urged, That here was a champertous agreement, for there was no consideration for the assignment of this Obligation and Indenture to the Plaintiff, upon which the Action is brought by him. The Judgement was stayed till the other part should move.

More against Stone.

Pasc. 24 Car. Banc. Reg.

Arrest of Judgement in Trespass by Assault and Battery, and taking away his Servant. Retainer.

An Action of Trespass of Assault and Battery, was brought by the Plaintiff for assaulting and beating, and taking his Servant for two Months, per quod servitium amisit; The Defendant pleads not guilty, and thereupon is an Issue joyned, and a verdict for the Plaintiff. The Defendant moves in an arrest of Judgement, and for cause shews, that the Plaintiff hath not set forth how the party was his Servant, whether as an Apprentise, or by retainer, as he ought to have done. But the Court said, that the Record implies that he was his Servant at the time when the Trespass was done, and that is enough, and this is the usual form of declaring in this Action in the Common-pleas, and in this Court also (and so many of the Councel at the Bar affirmed) and therefore let the Plaintiff take his Judgement.

The King against Holland.

Pasc. 24 Car, Banc. Reg.

To stay Judgment upon a Memorandum of a Record out of the Chancery. Judgement.

Hales offered to the Court these reasons why Judgement should not be given here in this Case between the King and Holland formerly spoken to. 1. That the Record is not here in this Court, but only an extract of the Record out of the Record which is in Chancery, and therefore judgement cannot be given here: for a judgement must be given upon the Record it self. 2ly. It would be inconvenient if it should be otherwise, for the Chancery is Judge of the Inquisition, and so there may be judgement one way in Chancery, and another way here, if the Record be not removed hither. And there is difference where a transcript of a Record is removed out of a Court which cannot proceed upon the Record it self, and where it is a tran-
Transcript. script of a Record, upon which Record the Court may proceed, as it is in our Case, 39 H. 6. 6. 14 E. 4. 1. & 7. 3ly. It appears not to this Court how the Commission and Inquisition are executed, whether well or not, and therefore it cannot judge of it. Maynard on the other side prayes, that judgement may be given here, upon the memorandum of the Record sent hither out of the Chancery for these reasons, 1. Every Court ought to give judgement on the one side or other; therefore if the King may have judgement here, the party may also have judgement. 2ly. The Record is here

in

in this Court virtually by sending of the Memorandum of it hither, and that is enough to give Judgement upon. 3ly. The Chancery and this Court as to the giving of judgement here, are as it were one Court, 24 E. 3. f. 77. 4ly. There is a ground for judgement to be given here, and it cannot be given elsewhere, for an Award in Chancery is no Judgement, and so there cannot be two several Judgements, one in Chancery, and another here, as Hales supposeth; and in Lathams case, the Record was removed as it is here, and Judgement given upon it in this Court. 5ly. The Chancery is not to be Judge: for the Traverse was there, and the cause removed hither, and we cannot go back thither again: for if we should do so, we should have Judgement in no Court; If it had been upon a Demurrer in Chancery, then there might have been a Judgement there, but not now the Cause is removed by Traverse, and a Patent shall not be corrected by the Enrolment, but the Enrollment by the Patent under Seal. Hales on the other side said, That it is the Record of the plea that is transmitted out of the Chancery hither, but not the Record of the Inquisition or Commission upon which it is found, and how then can there be any Judgement? Roll Justice said, That the Amoveas manum is but a consequence of the judgement, and not the Judgement it self, and we may give Judgement without the Inquisition against the King, And the Record is transmitted hither to determine whether the King or the party hath right, and the Chancery cannot intermeddle: for by this means the Courts will clash, which would be inconvenient. Bacon Justice spoke to the same effect. Roll Justice added this; If an Office be found to entitle the King in the Chancery, and it be transmitted hither, and it appears to this Court that the office is not good, shall not we give Judgement against the King? certainly we shall. But the Court would advise, and desired to hear the Kings Councel what they could say for the King.

Award.

Amoveas manum.

Pasc. 24 Car. Banc. Reg.

AN Action of Trespass was brought for taking away divers parcels of Houshold-stuff, and upon non Culp. pleaded, the Plaintiff had a verdict, The Defendant moved in arrest of Judgement, and shewed for cause, that the Declaration was not good, because divers words in it were insensible, as 1. The Plaintiff declares, for taking away unum Lenat, Anglice, a Mat, whereas Lenat is no word in any Language to signifie any thing, and therefore the Anglice cannot help it. To this the Court answered, That it is all one as if it were left out of the Declaration, because it signifies nothing in it, and so there is no dammages given for that thing which it should signifie. 2ly. He declares for taking away tria suspendia, Anglice, Pot-hooks, or Hakes, But the Court held this good enough. 3ly. He declares for taking away unum Adustum ferreum, which are two Adjectives and signifie nothing. To this the Court said, if they signifie nothing, then no dammages are given for it, and therefore let the Plaintiff take his Judgement.

Arrest of Judgement in Trespass for taking away Goods.

Dammages.

Pasc.

Pasc. 24 Car. Banc. Reg.

For an alias habeas corpus with pain.

Alias.

Return.

Fine.

UPon reading of the return of Collonel Tichborne Lieutenant of the Tower of London upon an habeas corpus directed to him, on the behalf of John Lilborn committed by order of both houses of Parliament for his contempt to them, Cook of Councell with the Prisoner moved for an Alias habeas corpus with a pain, because the Lieutenant had only returned the Writ; but not brought the body of the Prisoner. Bacon Iustice, If there be sufficient matter expressed in the return to detein the Prisoner, to what purpose should we grant an Alias, therefore if the return be insufficient, move your matter against it. But Roll Iustice said, the Lieutenant ought to make his return either against the jurisdiction of this Court, or else he must bring the body of the Prisoner hither, and it is in our power to set a fine upon him, for making an insufficient return. Therefore the Court ordered that he should amend his return, or else they would grant an Alias with a pain.

Hocker against Lamb.

24 Car. Banc. Reg.

Trin. 23 Car. rot. 1592.

Error to reverse a Iudgment for error in the venire.

Lieu conus.

Hundred.

VVard.

HOcker brought a Writ of Error in this Court against Lamb to reverse a Iudgement given against him, in the Court at Colchester in Essex; and assigns for Error, 1. That the venire is awarded larger than the Declaration. To this Roll Iustice said, the Ward within Colchester mentioned in the Declaration is but a lieu conus; but in London the Ward is in the nature of a Hundred, and so differs from this Case; a second exception was, that the time of the Assumpsit, upon which the Action in which the Iudgement was given was founded is expressed in figures, viz. the time for the delivery of the goods promised to be delivered, as also the time of the request for the delivery of them, as also the costs, and damages adjudged. Vpon these exceptions the Court ordered the Iudgement to be reversed except very good cause should be shewen to the contrary.

Pasc. 24 Car. Banc. Reg

For discharge of 2 prisoners at the bar by habeas corpus

Discharge.

Bail.

THe Court was moved to discharge two prisoners committed for suspition of murther, and brought to the bar by a habeas corpus returned for the insufficiency of the return, and upon two certificates offred to the Court, That the partyes who did the murther, for which these prisoners were committed, were Executed for the same, and had confessed that they did it. But Roll Iustice answered, if the return be touching Felony, though it be insufficient we cannot discharge the partyes. The Court thereupon was moved, that they might be bailed, which was granted, and they were bailed

bailed by four in [illegible] a piece that the prisoners shall appear at the next assises at Berry in Suffolk.

Pay against Paxted.

Pasc. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an inferiour Court; And the Error assigned was in a continuance, which was ad proximam curiam, scil. 16. die, whereas the Court was not held that day, but 26. die. Roll Iustice said, peradventure the scilicet may be void. Yet the Iudgement was reversed, antea

Error to reverse a judgement for a discontinuance.
Discontinuance.

Kenistон against Jones.

Pasc. 24 Car. Banc. Reg.

Mich. 23. Car. rot. 587.

AN Action of Debt was brought upon an obligation with condition to stand to an award; the Defendant pleads nullum arbitrium; the Plaintiff sets forth the award, and assigns a breach, and upon that an issue is joyned, and a special verdict is found, and upon the special verdict 2 questions arose, one upon the submission, another upon the award. The 1. question was, whether a misrecital of the date of one of the obligations of submission by the Arbitrators in their award, shall avoid the award. Philips of Councell with the Plaintiff argued that it should not, because that now the parties are concluded by the plea, and the verdict found upon it. 2ly. Whether the Arbitrators have exceeded the submission; he held they had not; for the first point he said, 1. That the submission was the submission of the parties, and the mistaking of the Arbitrators of the time when it was made is not material, nor shall hurt it, for the bond of submission is not in the custody of the Arbitrators, and so they might easily mistake the date, because they had it not to view, Plow. Com. 79. Crokers case. 2ly. The date of the obligation is not an essential part of the obligation, for an obligation may be good though it have no date, & therefore the mistaking of the date is not much material; 3ly. There is sufficient certainty of the bond expressed in the award, though the date be mistaken, & a void additional description of it shall not avoid a good description of it set forth in the award. Doughtyes case Cook 3. rep. & Dyer 292 4ly. The misrecital is not in words affirmative; but meerly in words relative. 5ly. The clause of misrecital refers to the deed recited by the prout, which is certain enough, and the law rejects the misrecital as a thing impertinent, 6. rep. 36. Dyer 116. For the second point, although the submission should be void, yet by the issue joyned the submission is confessed, and it is now contrary to the submission to plead nul award, Dyer 32. 28, 29 H. 8. 2. rep. 4. and the parties in our case do differ only whether there be an award or not, and not whether there be a submission or no. And as touching the award it self, I hold that the submission is not exceeded, for all matters in difference between the parties are submitted; but not the bonds of the submission. 2ly. It shall not be taken to be alleged expressly

Argument upon a special verdict in debt upon an obligation to stand to an award.
Recital.
Conclusion.
Date.
Award.

of the matters only submitted, and not of others, if the contrary do not appear either by the Plaintiffs allegation or doubt of the Jury. 3ly. All the award is performed before the discharge of the obligations of submission. 4ly. The award is at least good in part, and it being not performed in this part that is good, the obligation is forfeited, Cook 10. rep. Kel. 43.45 Hob. pag. 267. Nabys case, and so prayes Judgement for the Plaintiff. Latch for the Defendant. 1. The verdict is not contrary to the issue, nor admission in pleading, nor out of the issue, but within it, for the issue is whether the award be good modo et forma, and the submission is an essential part of the Award, and ought to be alleged in the Award, otherwise the Award is not good, and it is here alleaged in the issue also, Dyer 216. 9 H. 7. 3 and the negative here implies nothing. Another question is, whether the Jury have found the Award set forth in the replication, or whether they have found any Award at all, and if any Award be found, it is such an Award which is not in issue in the replication, and so the verdict is for the Defendant. And as to the Award it self, I hold it void, for the parties have not submitted to the Award that is made, for there is no submission to the determination of matters arising between the time of the sealing of one Bond, and of the other Bond, and so the Arbitrators have exceeded the submission, for they have awarded to make releases at the sealing of the last Bond, which comprizeth all the time between the sealing of one Bond, and of the other. Next, part of the Award is not good by exceeding the submission, and this makes all the Award naught, for all the parts of this Award do so depend one upon another, that if one be naught all is naught. And the last part of the Award is naught, and so the Award is made but on the one part (which cannot be good,) for if the release be not made, all Actions between the parties cannot cease according to the Award, and so the Award is not final; And there is no verdict here for the Plaintiff, although the verdict should not be for the Defendant, for it appears not whether the 15th. of April be before or after Easter, and so prayes Judgement for the Defendant. Roll Iustice said, if there appears a material variance between the Award set forth, and the Award pleaded, it is ill: And it is a question whether we be bound to take notice of the Almanack, and the feast dayes there set down or no. It was adjourned to be argued again the next Term.

Notice.

Thynn against Thynn.

Pasc. 24 Car. Banc. Reg.

In this Case wherein exceptions were formerly taken to the Writ of Error, and argued, Bacon Iustice said, he had read over the book, and doubted whether many of the Errors formerly assigned are not out of dores, because the certiorari is not well returned before us, for the certiorari is directed to the Recorder, and it is returned by the Deputy Recorder in his own name. Roll Iustice doubted also, for he said, all the old presidents were against this return. But if the Writ be directed to a Recorder, who is custosbrevium, or to a Recorder, and his Deputy, then the return as it is will be good.

Opinion of the Court concerning a return.

Return.

Twisden

TWilden of Councel with the Plaintiff in the Writ of Error in the Wiltshire cause took these exceptions. The first exception taken was, that the demand of the Dowr, is larger than the originall Writ, for that the demand is of the Parish of Timesbury, and the Writ is of the Vill of Timesbury, which is not so large by intendment as a parish, because there may be divers Vills in one parish; and he said, that in some case a Writ shall restrain a demand; in other cases it shall not, namely where they cannot stand together, and so is it here, 21 E. 4. f. 24. 3 E. 3. f. 56. A second exception was, that the nature of the tithes demanded are not set forth, although they be not in gross, but appendant as they ought to be, and a feme was not dowable at all of tithes before the Statute of 32 H. 8. and a feme is dowable of Common appendant, but not of Common in gross. A third exception was, that Dowr is recovered of a thing not dowable, viz. of a quarry of stones, for if she should be dowable of a quarry of stones, this would be to the destruction of the inheritance, and indeed it is impossible, for a quarry of stones cannot be divided by metes and bounds, which must be if she should be endowed of it. And also if the mine, and quarry should be divided, the Tenant of the Land would be prejudged; and that a quarry cannot be divided, see Cooks Lit. 164. and so was it adjudged 2 Iac. upon a reference to the Judges. Next, there is also Error in fact, for the Hundred of Warminster extends into the Hundred of Sutton parva, and so if she be endowed of the Hundred of Warminster, she will be endowed of the third part of two Hundreds, which is more than she demands by her Writ of Dowr. Maynard of Councell with the Defendant in the Writ of Error said, as to the summons he held there is a good summons, and cited Hob. 137 Dalt. f. 86. And there may be divers parishes in one Vill, as well as divers Vills in one parish; And to the exception that the demand of the Dowr in the Writ is generall, whereas it ought to be a special demand; he answered, the demand in Dowr differs from other demands, and is more favoured in Law; for as Dowr it self is favoured in Law, so are the proceedings in Law to recover it, 6 E. 3. 45. 16. E. 2. 7. 8 H. 3. 11 Ed. 3. 85. 25 Ed. 3. brev. 412. Fitz. Dowr 8 E. 3. Sect. 434. Reg. 39. And as to the surplusage in the demand, this shall not abate the Writ 4 E. 3. 52. Fitz. brev. 714. And that the parish should extend out of the Vill, is a forein intendment, and shall not be so taken against an Averment, and when a Vill, and a parish are named by one name, one of them shall not be intended larger than the other, if the contrary be not shewn. Long quint. Ed. 4. f. 20. And he argued that a feme is dowable of a quarry, and that it may be divided by metes and bounds, for it may be divided by the profits, although it cannot be divided by the quantity of the thing. Roll Iustice said, By no manner of pleading can one abate a Writ after Judgement, and how should it be so here. And 2 Cases were cited by the Councell that bis petita shall not abate a Writ. Mich. 9 Iac. Bolstrod and Brooks case, and Easton and Styles case in a Writ of Dowr.

Error and exceptions offered to a Iudgement in Dowr.

Demand.

Dowr.

Error in fact

Abatement.

Pasc. 24 Car. Banc. Reg.

THe Plaintiff brought an Action of Trespasse quare vi et armis for resetting of a Prisoner out of his possession, and hath a verdict against the Defendant. The Defendant moves in arrest of Iudgement, for that the Plain-

Arrest of Iudgement in an action of Trespas vi et armis, for reseous.

Plaintiff ought to have brought his Action of Trespass upon the Case, and not an Action of Trespass quare vi & armis. But Roll Iustice answered, that he might have an Action upon the Case, or a Trespass vi & armis at his election, and therefore the exception is null. Another exception was taken, that there was 4 years between the time of the Trespass done, and the time of bringing the Action. Roll Iustice answered, you should have pleaded this matter if you would have had advantage by it, but it is to no purpose to urge it. Another exception was taken, that the Declaration says that he took him in his possession out of his possession. But the Court over-ruled this also, and ordered the Defendant to shew better matter why Iudgement should not be given against him.

Election of Action.

King against

Pasc. 24 Car. Banc. Reg.

For a Procedendo in an action upon the Case removed out of London. Custome.

KIng brought an Action of the Case in London against the Defendant, for speaking these words of her, Thou art a Whore, and Cantrels Whore, and hast been so this forty years. The Defendant removed the Cause into this Court by a Certiorari; the Plaintiff moved for a Procedendo. But nothing was done in it, for the Court was divided: for Bacon Iustice held the words not actionable. But Roll Iustice held, that by the Custome of London they were, though not at the Common-law.

Aylett against Stellam.

Pasc. 24 Car. Banc. Reg.

Cause why no new Tryal. Challenge. Advantage. Entry.

TWisden upon a rule of Court to shew cause why there should not be a new Tryal, said, that two things were alleged on the other side that there ought to be a new Tryal. 1. That two of the Jurors were of kin to the Plaintiff. And 2ly. That there was notice given to the Defendant of a second Venire facias. To the first of which he answered, that the Jurors were not of kin, and produced an Affidavit for proof. Roll Iustice interrupted him, and said, it is not now material whether they be of kin or no, for the Defendant should have taken advantage of that upon his challenge at the Tryal. And for the second, it matters not whether he gave notice of the second Venire or no: for the rules of the Court do not enjoyn him to give notice. Maynard of Councel with the Defendant urged, that two of the Jurors were of kin, and produceth an Affidavit to prove it, and said, that the Defendant was also surprized for want of notice of the second Venire. Roll Iustice said, the second Venire ought to be entred here, and if it were not entred, how can the Defendant know whether it be altered or no? Yet here is no breach of the rules of the Court, and so the proceedings are fair: for the Venire may be entred, or it may not be entred, and if it be not entred, the party may go to the Attorny, and procure a Copy of it before the Tryal: and though the Venire be not entred till after the Assises, it is well enough. Therefore let the Plaintiff take his Iudgement.

Thyn

Thyn against Thyn.

Pasc. 24 Car. Banc. Reg.

LAtch of Council with the Plaintiff in the Writ of Error argued again, and held, 1. That the nature of the Tithes demanded in the Writ of Dower ought to have been expressed, for the demand may peradventure be of such Tithes, whereof the Feme is not dowable. 2ly. Where the thing it self is demanded of which the Sheriff is to give possession, there the Demand of it ought to be certain: for as it is in a Demand in an Ejectione firmæ, or an Assise, so ought it to be in a Demand in a Writ of Dower, Dyer, f. 116. & 258. 11 Rep. Harpers Case, Dyer, 83. the Sergeants Case, 44 E. 3. 5. Cooks Entries, tit. Dower plac. 2d. and though the Demand be of all Tithes, yet they ought to be specified, as it is in Harpers Case; and so it is of Tithes in gross, 11 Rep. Savills Case, Mich. 12 Iac. Bales and Hamond in this Court. And as to the Return, a Chapel is demanded, and Judgement given for it, and yet the Return doth not mention it; and it is not enough to comprise it in other words, and it is doubtfull whether a Chapel be a Tenement or no: for it is not a temporal Inheritance, as an Advowson is, Dyer, 83. In some Case the Writ may be general, and the Count special: but that is where there is not a special form of Writ. 2ly. a Chapel is not conveyed in Fines and Recoveries, or Entries, by the name of a Tenement, nor in any judicial proceedings, but Tenementa in a Grant may contain a Chapel. 3ly. The particular enumeration of other things, and the omitting of the Chapel makes it ill; and so would it be in a Grant by such an enumeration, Dyer 161. The Case of the Hamlets, 36 Eliz. Ewer & Heydon, 21 & 22 Eliz. the Bishop of Norwitches case, 8 Rep. 18. Doctor Bonhams Case, 12 Ed. 1. Grants 87. Other exceptions he took to the Judgement and execution. First to the Judgement, that a Hundred cannot be delivered by metes and bounds: for a Hundred is but a Jurisdiction, and is entire. 2ly. The execution is ill: for a Court of Frank-pledge cannot be divided by metes and bounds, Cooks Instit. 32. and Dower is assignable either by metes and bounds, or in common or in special manner. lib. Intrat. 18. He took also Exceptions to the second Judgement, that dammages of the value of the Tithes are not to be given in Dower; next the Inquisition doth not find, that the Husband dyed seised of the Tithes, and then there can be no Judgement given for them. And the dying seised of the Rectory, is no dying seised of the Tithes, nor is the dying seised of the Chapel, a dying seised of the Tithes appurtenant to it, for the Chapel is but the Chapel-House, or Oratory, 11 Rep. Harpers Case. Then for the Error in fact, the demand is of the Manner of Lullington, and this extends out of Lullington, and it is not repugnant to the Record to assign this Error in fact, and it could not have been pleaded in abatement of the Writ, 8 E. 3. 68. A Nuper obiit resembles a Writ of Dower, 7 E. 3. 28. 7 E. 3. pl. 5. 12 Ass. 20. 26 E. 3. 72. 29 Ass. 55. 10 E. 4. 11. 9 E. 4. 3. 9 E. 4. 17. And so prayed the Judgement might be reversed. It was adjourned to be argued again the next Term.

Argument in Dower.
Demand.
Return.
Tenement.
Writ.
Hundred.
Dammages.
Nuper obiit

Hill against Bird.

Pasc. 24 Car. Banc. Reg.

Cause why no Prohibition to the Prerogative Court.

Upon a rule of Court to shew cause why a Prohibition should not be granted to the Prerogative. Latch stated the Case to be this: A man died intestate, the Daughter of the Brother of the Intestate (her Father being dead) procures Letters of Administration, and a Son of the Sister of the Intestate sues in the Prerogative to revoke the administration, or to have distribution of the Goods; the Administrator prays a Prohibition; and hereupon he prays, that either no Prohibition at all is to be granted, or else it must be special. Roll Justice, The Daughter of the Brother, and the Brother of the Sister of the Intestate are in equal degree of kindred, and the Ordinary may grant administration to which he pleaseth. Latch urged, that the administration was not yet setled: for it was granted upon Condition, and if the Administrator will not bring in an Inventory, the Ordinary may alter the administration. Hales on the other side prays, there may be a general Prohibition cuilibet, &c. Roll Justice, The Prohibition must be against some certain person; but if divers have appeared to sue, there a Prohibition shall be against all of them, and the Jurisdiction of the Court cannot be enlarged by the agreement of the parties, Hob. Tucker and Bones Case. And an administration cannot be revoked, for the not bringing in of the Inventory and Accompt by the Administrator. The libel was afterwards read, which was, to have distribution of the Goods, or else to reverse the Letters of administration, and upon this the Court granted to a Prohibition, if cause be not shewn upon notice to the contrary, as to the Distribution, but not generally.

Prohibition.

Administration.

Inventory.

Revocation.

Leving against Gamble.

Pasc. 24 Car. Banc. Reg.

Arrest of Judgement in Trespas.

In arrest of Judgement it was urged, that the Declaration was incertain; for the Plaintiff had declared pro quinque pecias stanni, anglice Pewter-dishes, whereas pecias stanni did not signifie Pewter-dishes; for it might be Spoons, Pots, or any other sort of Pewter as well as Dishes.

Anglice void.

But the Councel on the other side said, it was well enough, and prayed for Judgement. Roll Justice said, the Anglice shall be void, and then the Latin is good, for it is five pieces of Pewter, and it matters not what pieces they be: For it is ad valentiam, which makes the value certain enough to the Jury. Therefore let the Plaintiff take his Judgement.

Scoble against Tolye.

Pasc. 24 Car. Banc Reg.

Demurrer upon a Replication in Trespas.

Scoble brings an Action of Trespas against Tolye, for taking away his Cattel. The Defendant pleads that the Plaintiff was possessed of the Cattel joyntly with another not named in the Writ, and demands Judgement of the Writ. The Plaintiff replies, that the other with whom he was joyntly possessed was dead at the time of the Action brought; The Defendant

dant demurs for delay. The Court ruled a respondes ouster. Maynard of Councel with the Plaintiff said, it was peremptory; But the Court was against him, and ordered the Defendant to plead in chief Saturday following. Peremptory.

Hart against Buckminster.

Pasc. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 225.

HArt brought an Action of Debt upon an Obligation of 200 l. against Buckminster, and sets forth that the condition of the Obligation was to this effect, That whereas Hart had carryed so many thousand of Billets and delivered them at Dartford in Kent, for the use of Buckminster, amounting at so much by the thousand, to a hundred pound in the whole, if therefore the Defendant should pay the said hundred pound at such a time and place, that then the Obligation to be void, or else to be in force; and for non-payment was the Action brought. The Defendant sayes that the Plaintiff did not carry and deliver so many thousand of Billets to Dartford as the Plaintiff had declared, and demands Judgement of the Action. The Plaintiff by way of replication demands Judgement if the Defendant shall be admitted to pleadt his Plea, which is contrary to the averment of the Obligation, which is his own Deed, and shall not be estopped thereby. To this the Defendant demurs. And the Court held that this recital in the Obligation is an Estople to the Defendant to plead the contrary; and the rule was, for him to shew cause why Iudgement should not be given against him upon his Demurrer. Iudgement demanded of a Plea. Estople.

Southcott against Southcott.

Pasc. 24 Car. Banc. Reg.

SOuthcott brought an Action upon the Statute of 2 Ed. 6. for not setting forth of Tithes against Southcott, and hath a verdict The Defendant moves in arrest of Judgement, and shews that the Declaration was too generall and incertain: for it is for such a quantity of Grain, and doth not set forth what sort of Grain, and so it may be for Grain not titheable. Maynard of Councel with the Plaintiff held, that in this Case the Declaration was well enough, although it would not have been so in an Action of trespass, for that Action requires more certainty. A 2d. Exception was, that it is not said whether the Corn was in Garbs or Sheaves. To this Maynard said, it is well enough notwithstanding, for it shall be intended only of such Grain as is usually put in Garbs. Hales of Councel with the Defendant said, the word Grain was too general a word to be used, and no certainty in it, for it extends to Mustard-seed, Cole-seed, Rape-seed, &c. and the genus ought to be expressed, and it shall not be intended of Corn put in Garbs. The Court would advise, but enclined the Declaration was too general, and not good. Postea. Arrest of Iudgement in an Action for Tithes upon the Stat. of 2 Ed. 6. Incertainty.

Pasc.

Pasc. 24 Car. Banc. Reg.

Proceeding against a Prisoner for high Treason.

SIr John Stowell endicted in the Country for high Treason was brought to the Bar by a Habeas corpus to be tryed, and desired to hold up his hand, which he refused. But the Court admonished him to do it, because that before he did so he could not plead, and if he were to plead a pardon for Treason, he could not do it, till he were first charged with the Endictment. And Doctor Stories case, 32 Eliz. was cited, and it was said, that though in an Endictment for Felony, if the Prisoner refuse to plead he is to be pressed;

Pressing.

Yet in Treason it is not so, for if the Prisoner indicted of Treason will not put himself upon his Tryal, or answer impertinently, which is not answering, but nugation, judgement shall be given against him as taken pro confesso that he is guilty.

Judgement. Pro confesso.

Pasc. 24 Car. Banc. Reg.

Arrest of Judgment in an action upon the Case.

AN Action of the Case was brought against one for causing the Plaintiff to be endicted of Rebellion and Felony. The Defendant moves in arrest of Judgement, and shews, that the Declaration was incertain, for it sets forth an Endictment in quo crimen rebellionis ei imposuit & felonii, which words are so incertain, that it appears not what the Plaintiff was charged with in the Endictment, and so there could never have been any Judgment given against him. Maynard on the other side said, it was well expressed, and could not well be otherwise expressed than it is. Bacon Iustice said, there may be Rebellion which is not capital, as Rebellion in Chancery. But Roll differed in opinion, and said, the intent of the words spoken is to be considered. The rule was, to bring Books to the Iudges.

Rebellion.

Intention.

Mayhue and Baspool.

Trin. 24 Car Banc. Reg.

Error upon a Judgement in an Action upon the Case.

BAspool brought an Action upon the Case upon a promise against Mayhue, and hath a Judgement against him. The Defendant brings a Writ of Error in this Court to reverse the Judgement, and assigns for Error, 1 It is not said in the Declaration, that the promise was made within the Iurisdiction of the Court. But Roll Iustice answered, that it was, that the Defendant was indebted tunc & ibidem, which shews, that he became indebted within the jurisdiction of the Court, and the being indebted there is an Assumpsit in Law, that he will pay the Debt, and therefore it is not needfull to shew expresly that he did promise there to pay it, 2ly. The Venire is duodecim probos & legales homines, whereas it should be liberos, &c. But the Court over-ruled this exception also, and affirmed the Iudgement except better matter should be shewn.

Iurisdiction.

Assumpsit.

Win

VVinn against Stebbins

Trin. 24 Car. Banc. Reg.

VPon a rule of Court for a reference to the Secondary, whether the party, and the Sheriff were in contempt to the Court for taking out of Execution, and executing it after a Writ of Error brought upon a Judgment, it was moved that he might make his report, who thereupon reported to this effect; That there was a writ of Error brought upon the Judgement before Execution taken forth; but there was no notice thereof given to the party, nor any supersedeas taken forth to stay Execution, and therefore the Plaintif might take out Execution, notwithstanding the writ of Error brought, and that thereby he is not in contempt to the Court. Roll Iustice said, Then is the Execution now well executed, and the Sheriff is in no fault. Maynard of Councel with the Plaintif in the writ of Error, moved that the Execution was awarded improvide, and therefore the Court may restore the party to his goods taken in Execution, although the Sheriff be not in fault. Roll Iustice, The party ought to take notice of a recipitur upon the Record if it be entred, and if the party take out Execution after the writ of Error is allowed, he is in contempt to the Court, else not, and the Attorny is not bound to view the Record whether a writ of Error be brought; but may take out Execution if there be not a supersedeas, or notice given to the party. Therefore there is no help here, for the proceedings have been according to the course of the Court, for by the delivery of the writ of Error to the Officer of the Court, the hands of the Court are closed. Yet let us see the President that Woodward hath to shew, and let the Secondary examine it again.

Whether a contempt to the Court or not.

Notice.

Contempt.

Exception.

Supersedeas.

Trin. 24 Car. Banc. Reg.

AN Action of accompt was brought touching the fraight of a Ship, and a Iudgement that the Defendant shall accompt, and Auditors assigned, and Manucaptors found to appear before the Auditors, the Court was moved for a scire facias against the Manucaptors, because that the Defendant did not appear at the day before the Auditors assigned, and secondly it was moved that the Court would assigne a day peremptory, for the party to appear before the Auditors. But Roll Iustice said, a day cannot be assigned until a certificate be made to us from the Auditors, for they are trusted, and are Iudges of the cause, and have power to excuse the non-appearance of the party at the day, if they see cause, and to give longer day or shorter, for the party to appear as they think good, and therefore till they certifie, neither can you have a day assigned, nor a scire facias against the Manucaptors.

For a scire facias against manucaptors.

Certificate, Auditors.

Scire facias.

Clementſon againſt Montford

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1493.

Error to reverſe a Judgement in an action upon the caſe.

A Writ of Error was brought to reverſe a Judgement in an Action upon the Caſe brought by an Adminiſtrator in the Court at Eſham; The Errors aſsigned were, 1. The Plaintiff doth not declare that the adminiſtration was granted unto him per loci illius ordinarium. 2ly. The Plaintiff ſaith in his Declaration, producit litteras Adminiſtratorias inteſtati, whereas it ſhould be ordinarii, and not inteſtati. 3ly. The Court cannot by its priviledge being an inferiour Court, and that but newly erected, award a Capias upon entring the plaint, as it is here done. 4ly. The Court began firſt to be a Court, but 9 Iac. and yet it is ſaid to be held per uſum et conſuetudinem curiæ. Twiſden to the 1. exception ſaid, that it is helped by the verdict. Roll Iuſtice asked how doth it appear that Eſham is within the Diocels of the Biſhop that granted the Letters of Adminiſtration, for if it be not, the Letters are not well granted; And ſaid, that in a Declaration it is not neceſſary to ſay that Letters of Adminiſtration are granted per loci illius ordinarium, aut cui pertinuit, although they ought to be ſo pleaded in a plea in Bar. To the ſecond exception, Twiſden anſwered, that the words mentioned are not neceſſary, and the Declaration would be good enough without them, and therefore they ſhall not hurt it, though they be miſtaken, and if it ſhould be otherwiſe, yet they are helped by the verdict; and to the firſt exception he ſaid, that the words ſecundum uſum et conſuetudinem ſhall be intended to be meant according to the Law, and not according to ancient uſage, as is urged by the Councell on the other ſide. The rule was that Iudgement be affirmed except better matter ſhould be ſhewn Monday next.

Capias.

Adminiſtration. Declaration. Plea.

Read againſt Palmer.

Trin. 24 Car. Banc. Reg.

Arreſt of Iudgement in an action upon the caſe.

Read brings an Action upon the Caſe upon an aſſumpſit to ſtand to an award againſt Palmer, and hath a verdict. The Defendant moves in arreſt of Iudgement, and ſhews that there was an amendment in the conſideration, and the promiſe after the iſſue joyned. Twiſden anſwered, it is not material, though it be ſo, for the matter of the Aſſumpſit is implyed, and the words altered are idle, and cited 37 El. Heydons Caſe, for it is de et ſuper præmiſſis, which implyes all the matter. Roll Iuſtice ſaid, that the words de et ſuper præmiſſis goe not to the time, but to the matter ſubmitted, and ſaid that the words poſtea, ſcilicet eodem die, upon a contract in Law ſhall be intended the time of the contract, but here is a ſpeciall contract and collateral, and it ought to be otherwiſe intended, and deſired to ſee a book.

Amerciament.

Contract in law. ſpecial contract

Free-

Freeborn against Purchase.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1575.

Demurrer to a Declaration in an action upon the case.

FReeborn brought an Action upon the Case against Purchase, and declares that the Defendant in consideration that the Plaintiff had paid unto him such a sum of money, did assume, and promise to joyn in the surrender of certain Copyhold Lands, and that for not performing this promise he brings his Action. The Defendant demurs upon the Declaration, and shews that the Plaintiff doth not allege that he made any request to the Defendant to joyn in the surrender, which he ought to do, for it was not a single Act to be done by the Defendant alone; but he was to joyn in the Act with another. Roll Justice said, the promise is that the Defendant shall joyn in the surrender, and he doth not say that he did request him to joyn, which he should have done. And besides the breach is not well assigned, for you have assigned a particular way how he should surrender, namely into the hands of 2 Tenants of the mannour, whereas he did assume only to joyn in a surrender, which may be in Court, or into the hands of the Lord, as well as into the hands of two Tenants; so is Syms and Walkers Case, 9 Car. Also the Plaintiff ought to have shewed that there is such a particular custom in the manour, that a Copyhold Tenant may surrender into the hands of two Tenants of the manour, or else such a Custom cannot be taken notice of. Therefore let a nil capiat per billam be entred against the Plaintiff.

Request.

Breach.

Notice.

Wright against Martin.

Trin. 24 Car. Banc. Reg.

To change a venue in an action for an escape. Local.

THe Court was moved to change the venue in an Action for an escape, upon an affidavit that the escape touching which the Action was brought was in another County, and not in the County where the Action was brought. But Roll Justice said, that an escape in one place is an escape all England over, and is not local; therefore the venue is not to be tyed to one place more than another. Yet let the other party shew cause why the venue should not be altred.

Trin. 24 Car. Banc. Reg.

Exceptions answered offered in arrest of Judgement in an action upon the Statute of 2 Ed. 6. for not setting forth of tithes. Recital,

VPon a rule to shew cause why Judgement should not be staped in an Action upon the Statute of 2 Ed. 6. for not setting forth of Tithes, these exceptions formerly taken were answered. 1. It was said the Statute was misrecited, for the day when the Parliament began wherein the Statute was made is mistaken; but to this it is answered, that the Declaration doth not say per Statutum in Parliamento inchoat. tali die, but in Parliamento tali die, and the Parliament was held by prorogation the day that it is mentioned, though it were not then first begun, and so that is well enough. To the second exception, that the Declaration doth say that the Plaintiff was primo die occupator ac postea eodem die, &c. So that it appears

Proprietor. pears not, that he was proprietor, and so the Action may not lye, for he may be occupator wrongfully, and so not proprietor. It is answered, that the Declaration is, that he was tali die possessionatus et ab eodem die occupavit, and this shall be judged of a rightfull estate, and it is said, that he is rector ecclesiæ, and so he shall be intended proprietor of the Tithes, if the contrary be not shewn. The rule was to shew better cause Friday following, else Judgement for the Plaintiff.

Sowthcott against Sowthcott.

Trin. 24 Car. Banc. Reg.

Exceptions answered taken to arrest judgement in an action for tithes. Tithes.

IN this Case formerly moved, and Judgement staied till the Plaintiff would move: Maynard for the Plaintiff moved for Judgement, and to the exception taken on the other side, that the word grain used in the Declaration is too general, and may extend to grain not titheable, viz. to rape-seed and cole-seed, &c. as well as to titheable, and so the Declaration is incertain; He said it is well enough, for it is said grain growing in such a field by name, which makes it certain, 2 rep. lib. Int. 176. 2d. Coment. f. 161. b. and for the word grain in comon understanding it is meant for corn, and not for seeds, though in a large exception it may extend to seeds also. Hales on the otherside said, that the word grain is incertain, and signifies more than corn, and also the word Garbæ is too generall, for it may extend to more than sheafs of Corn, for bundles of any thing bound up may be said to be Garbæ, as well as Corn bound in sheafs, and may extend also to grain not titheable. Roll Iustice held, the words in the Declaration,

Comon interest Seminavit cum grano proper enough, and that by common construction it shall be meant with Corn, and not with seeds, 10 Car. Goldsmiths Case, Hill. rot. 8. And for Garbæ, it is also well enough, for it shall be taken according to common construction, which is to signifie corn bound up, and shall not be taken in the large extent of the word for bundles of any thing else. And the Jury hath taken notice of it, for they have found debet, which had they not they could not have found the verdict so. The rule was for the Plaintiff to take his Judgement, if cause were not shewn Friday following.

The King and Sr. Henry Spiller

Trin. 24 Car. anc. Reg.

For quashing divers Endictments for not repairing of a Bridge.

THe Court was moved for the quashing of divers Endictments wherein Sr. Henry Spiller was endicted for not repairing a bridge; the exception to the first was, that it doth not set forth in what County the bridge lyes, and for that exception it was quashed. Another Endictment was for not repairing of Mays Bridge, and it doth not shew that the bridge is in the Highway. But to this Roll Iustice said, that the Endictment doth say it is a Common bridge, and that is enough, and it is needlesse to say it is in the Highway. Another exception was taken to this Endictment; that it did not shew whether the bridge were a cart bridge, or a horse bridge, or a foot bridge, or what other passage was over it, and for that exception that Endictment was quashed. To a third Endictment for not repairing the same bridge, this exception was taken, viz. It sayes that Sr. Henry Spillar was bound

bound to repair the bridge ratione manerii, which cannot be good; but it should be rationæ tenuræ manerii. Roll Iustice said, It ought to shew that he is owner of the manour, and although it do expresse that he is bound to repair it ratione manerii sui, that is but implication that he is to repair it, and makes it not appear that he is possessed of the manor, and upon this exception was this Endictment quashed. To a fourth Endictment for not repairing the same bridge, this exception was taken, that there is no addition of the County, where Sr. Henry Spillar dwelt, as the Statute directs, and for this it was also quashed. Yet afterwards because there was no certificate that the bridge was repaired, the Court would quash none of them, but said, let him plead to them: The Defendants Counsel moved that he might plead but to two of them, and that processe might be spared to the rest. Roll Iustice, Appear to all, and plead, and proceed in two of them, and processe shall be stayed to the rest.

Implication.

Addition.

Burrel and Lancaster.

Trin. 24 Car. Banc. Reg.

BUrrell brought an Action of Trespasse quare clausum fregit against Lancaster, and had a verdict; the Defendant moved in arrest of Judgement, and for cause shews that there is a variance between the writ, and the Declaration, for the writ is quare clausum fregit in the singular number, and the Plaintiff declares of divers Closes; But Roll Iustice said, That it was well enough, for the word clausum is nomen aggregativum, and may contain many Closes, and so may well enough agree with the Declaration. And therefore let the Plaintiff take his Iudgement.

Arrest of Iudgement in Trespasse quare clausum fregit.

Variance.

Nomen aggregativum.

Glide against Dudeney.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 426.

GLide brings an ejectione firmæ against Dudeney in the Common pleas, and hath a Iudgement by default against the Defendant, whereupon a writ of enquiry issues out to enquire of the Damages, and before the return thereof, the Defendant brings a writ of Error, the question was, whether the writ of Error were well brought, in regard that the course of the Common pleas is not to make up the Iudgment untill the writ of enquiry be returned. Roll Iustice said, that a writ of Error may be brought before the writ of enquiry be returned in an ejectione firmæ, for in that Action the Iudgement is compleat at the Common Law before it be returned, for the Iudgement is but to gain possession, and so is it in a writ of Dower; but in an Action of Trespasse where damages only are to be recovered, there the Iudgement is not perfect till the writ of enquiry is returned, nor can be made up before as in this case it may, but in regard that here is no compleat Iudgement entred, for there is no capias which ought to be in all Actions quare vi et armis, that the King may have his fine which else he cannot have

Error upon a Iudgement in an ejectione firmæ in the Comen plea

Iudgement. Error.

Error. Execution.

if the party do not proceed in his Writ of Enquiry, the Writ of Error is brought too soon, and you may proceed to execution in the Common-pleas, for the compleat Record is not here. Therefore advise what to do in the Common-pleas, for it is mischievous quacunque via.

Norton against

Trin. 24 Car. Banc. Reg.

Arrest of Judgement in Assault and Battery. Mis-sworn

Amendment.

NOrton brought an Action of Assault and Battery against the Defendant, and had a verdict against him. The Defendant moved in arrest of Judgement, that in the Venire facias one of the Jurors was returned by the name of Edmund, and it appears by the Postea, that he was sworn by the name of Edward, which cannot be intended to be the same person. Roll Iustice said, if the Clerk of the Assises, in returning of the Postea have mistaken the name, it may be amended here in Court by his notes, by which he made the Postea; and therefore let him be examined here whether it be a mistake or no.

Toby against Angel.

Trin. 24 Car. Banc Reg.

For a reference.

THe Court was moved for a reference in this Cause to the Secondary, because the Sute was commenced upon two Counter-bonds, which are both cancelled. Roll Iustice answered, then why should it be referred: for you may plead non damnificatus, if the truth of the matter be so: but the party may peradventure be damnified, notwithstanding the Bonds be cancelled, and may have good cause of Action.

Langly against Wybord.

Trin. 24 Car. Banc. Reg.

Demurrer to a Replication in Debt upon an Obligation to stand to an Award. Award.

LAngly brought an Action of Debt upon an Obligation to stand to an Award against Wybord. The Defendant pleads nullum Arbitrium. The Plaintiff replies, that the Arbitrators did make an Award, and sets it forth in hæc verba; The Defendant demurs and shews for cause, that the Award is not well set forth: for he doth not shew, that the Award was delivered up by the Arbitrators, according to the submission. Roll Iustice answereo, it was well enough, though it be not. A second cause was, that it is not said touching what sutes the Award was made. Roll Iustice answered, the Award is said to be de præmissis, and that is good enough. 3ly. The Award is, that all sutes shall cease. Roll Iustice, This is well enough. 4ly. The Arbitrators have exceeded their submission. The rule was to bring the Roll into Court, and till then the former rule to stand. Afterwards the Award was judged good, and the Plaintiff had his Iudgement.

Trin.

Trin. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an Inferiour Court, and the Error assigned was, That the plaint was entred before such an one Maior, and the sute was continued before another Maior, and it is not shewn that the first Maior was removed, and that the other Maior was lawfully elected and sworn. Roll Iustice said, that the Continuances in Inferiour Courts ought to shew the manner of the Continuances, and it ought not to be expressed generally. And it is not said tunc majori, which would have made it more incertain. I doubt the Venire facias is discontinued, and then there is no Tryal; therefore it is good to advise.

Error to reverse a judgement in an Inferiour Court.

Continuance.

Tryal.

Pragnell against Goff.

24 Car. Banc. Reg.

Goff brings an Action upon an Assumpsit against Pragnell, and hath a verdict, and a Judgement against him. The Defendant brings a Writ of Error to reverse this Judgement. The Case was this, Pragnell did assume and promise unto Goff, that in consideration that Goff would marry the Daughter of Pragnell, that he would be bound to give over his Shop unto him, and not use his Trade in Basingstoke, and would lend unto him fifty pound, and for not performing this promise he had his Judgement. The Error assigned was, that there is a breach laid of all the promise, which consists of divers parts, and one part of it is against Law, namely, the Promise to be bound not to use his Trade, and yet dammages are given entirely for all, which is not good. Wild on Counsel on the other side said, that in 2 H. 5. urged is no Judgement given, and in our Case it is not that he shall be bound not to use his Trade generally, but only in the Town of Basingstoke, and he may use it any where else, and therefore it is not against Law. Roll Iustice, If the words be general, that he shall not use his Trade in such a place without any consideration, this is ill: but it is otherwise if there be a consideration, for a man may sell his Liberty & Privilege for a Consideration, and it shall bind him. The rule was to shew cause Saturday next why Iudgement should not be affirmed. This was afterwards moved & objected, that part of the Assumpsit was to turn over the Defendants Trade, and dammages given for that which is impossible. Roll Iustice said, if dammages entire be given for some things with others wherof some are impossible, the dammages shall be deemed to be given for those that are possible, and void to the rest. The Indgement was affirmed.

Error upon a Iudgement in an Action upon an Assumpsit.

Assumpsit.

Dammages.

Peeling against Ken.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 89.

Peeling brought an Action of Debt upon an Obligation to stand to an Award against Ken. The Defendant pleads Nullum Arbitrium. The Plaintiff replies and sets forth the Award in hæc verba, and assigns a breach

Demurrer to a Replication in Debt upon an obligation to stand to an Award.

breach. The Defendant demurs to the Replication, and the Plaintiff joyns in the Demurrer. The causes assigned for the Demurer were, 1. To the Award it self, which is that whereas it appears that there was six pound and a shilling due by the Plaintiff unto the Defendant; the Arbitrators had awarded, that the Plaintiff should pay unto the Defendant six pound in full satisfaction thereof: which is lesse than they acknowledge to be due, so that it cannot be a satisfaction, 9 H. 7. f. 11. 46 E. 3. f. 7. 2ly. The Award is, that one of the parties shall deliver Dimissionem prædictam, whereas it ought to be Indenturam dimissionis: for the dimission is but the consent of the party to the Indenture, and not the Indenture it self, Cooks Instit. 43 6. 3ly. They award to deliver dimissionem prædictam in the House of a Stranger, which ought not to be: for the party must commit a trespass to do it, if he cannot get leave of the Stranger, which he is not bound to do, 9 H. 7. 16. 18 Ed. 3. 23 19 Ed. 4. 41. The words are, that it shall be delivered at the House, and in and at are all one in grammatical construction, Mich. 23 Car. Coleman and Painters Case. 4ly. They award one of the parties shall release three years rent to the other, and there was but two years rent due, so that it is impossible to be done. 5ly. They have made their Award upon a thing not submitted, viz. that there should be a release of all Actions which might concern the rent; and lastly, the party ought to shew he hath performed the Award on his part, which he hath not not done, 8 H. 6. 18. Brook Arbitrement. Twisden of Councel on the other side, to the first Exception said, it is not to the purpose: for Arbitrators may award a lesse sum than is due, in satisfaction of it, and though it be ill, yet the Award is good as to so much, whereof a good breach is assigned. To the second he answered, that the words dimissionem prædictam refer to the Indenture pleaded, and so that is well enough. To the third he said, that the Award is that the Indenture shall be delivered at the House, and it is lawfull for him to go to the House, though not into the House of a Stranger. To the 4th. he answered, that the words are to be understood that the party shall not pay the rent, and not that he shall release it. To the fift he said, that the words alleged are no part of the Arbitrement. And if the Obligation be released it is not material, for the Arbitrement is performed, and the words Premisses restrain the Arbitrement to the Submission. And to the sixth it is not necessary to shew how the Arbitrement is performed: for if it be not, the other party hath his remedy. Roll Iustice said, that in 12 Iac. it was adjudged, that if an Arbitrement was for a thing to be done in or at the House of a Stranger, it was well enough: for it may be intended to be done at the House without doing a Trespass, though not in the House, except the contrary be shewed by the party. In Lynyn and Williamson, Hoofs Case; and as to the words dimissionem prædictam, that is also well enough: for it shall be intended the Indenture of demise. But let us have Books and move it again. It was moved again, and another exception taken, that the promise was released; Upon which the Court would advise.

Award.

Averment.

Smith against Hobson.

Trin. 23 Car. rot. 1078.

Arrest of Iudgement in an action upon the Case.

SMith an Inn-keeper in Warwick brought an Action upon the Case against Hobson, for speaking these words, Collonel Egerton had the French pox,

pox, and hath ſet it in the Houſe (meaning the Plaintiffs Houſe) and William Smith and his wife (meaning the Plaintiff and his Wife) have it, and all you. The Plaintiff hath a verdict. The Defendant moves in arreſt of Judgement, and for cauſe ſhews, that the words are not actionable: for the words are, that Collonel Egerton hath ſet the French pox in the Houſe, which is impoſsible: for the Houſe could not have the por, and the words William Smith and his Wife have it, ſhall not be meant that they have the por, but the Houſe, for that is the nert Antecedent to the words, to which they ſhall refer. And alſo where words are ſpoken doubtfully whether they be ſpoken true or faiſe, they ſhall be taken to be true: and it may be here the words are true, and then no Action lies for ſpeaking of them: alſo the Baron and Feme ought to joyn in the Action, if they be actionable, for they are ſpoken to both their prejudice, and the Action is not to be brought by the Husband alone, as here it is. Alſo in this Caſe the words being ſpoken of a Houſe, the Writ of Enquiry of Dammages muſt be what Dammages is come to the Houſe, which cannot be. Roll Iuſtice, If an Action be brought for words, and part of them be actionable, and part are not, yet an Action lyes for them. And in this Caſe the Husband alone may bring the Action for dammages to himſelf, and he may afterwards bring another Action for the dammages done to his Wife. And he held the words here actionable, and bid the Plaintiff take his Judgement, if cauſe were not ſhewn to the contrary Saturday following. Iudgement was afterwards given accordingly.

joyn in Action.

Marſhall againſt Porter.

Hill. 23 Car. rot. 769.

MArſhall brings an Action of Treſpaſs Quare vi & armis for taking away his Cattel. The Defendant pleads non Cul. as to the vi & armis, and as to the taking of the Cattel he pleads, that he bought them in a Market-overt. The Plaintiff demurs to this Plea, and the Defendant joyns in the Demurrer. The Exception taken to the Plea was, that the Defendant doth not ſhew what day the Market was kept, nor whether it were out of Lent, according to the Patent for the keeping of the Market. Roll Iuſtice ſaid, this ought to have been averred in the Plea, and therefore the Plea is not good. Therefore let the Plaintiff have his Iudgement if cauſe be not ſhewn to the contrary.

Demurrer to a ſpecial plea in Treſpaſs. Quare vi & armis.

Averment.

Pitcher againſt Symons.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 189.

SYmons brought an Action upon the Caſe upon an Aſſumpſit in the Com- pleas againſt Pitcher, and hath a verdict, and a Judgement. The Defendant brought a Writ of Error here to reverſe the Judgement. The Error aſsigned was, that there was no iſſue joyned between the parties to the ſuit: for it is & prædictus Ioſephus ſimiliter, whereas it ſhould be prædictus Robertus. Roll Iuſtice cited 9 Eliz. Dyer, and ſaid, if it be prædictus Richardus where it ought to be Robertus, it cannot be amended, becauſe the Iſſue is altered: for it is joyned between other parties, and ſo is it in this Caſe. But move it again Friday next.

Error to reverſe a Iudgement in an Action upon an Aſſumpſit. Iſſue. Amendment.

Deacon againſt Foreſt,

Trin. 24 Car. Banc. Reg.

Whether a Plea was peremptory, or that there might be a Reſpondes ouſter.

Peremptory Plea.

DEacon brings an Action in this Court againſt Foreſt. The Defendant appears in Michaelmas Term, and imparls to Hillary Term, and before the day of Continuance pleads a Plea in abatement; to which the Plaintiff demurs. Yard of Counſel with the Plaintiff ſaid, he conceived the Plea was peremptory to the Defendant, becauſe it comes after an imparlance, & a Continuance, and ſo comes in lieu of a Peremptory: for the Law admits but one delay, and therefore the Defendant ſhould have pleaded in Chief, and not having done it, his Plea ſhall be as if it were a Plea in Chief over-ruled, and cited Long Quint. E. 4. f. 139. Roll Iuſtice, You cite not the Book as it is, here is but a Plea in Abatement, and the Continuance makes it not peremptory, 2 Ed. 4. f. 10. A ſecond Exception was, that the Plaintiff hath not demurred upon the Plea, but pleaded to iſſue, and here

Departure. is a departure from the general iſſue, 34 H. 6, f. 8, 9. Roll Iuſtice, The Book is againſt you, for upon a Demurrer a Plea dilatory is not peremptory: but upon an iſſue joyned it is. Yard, The delay of the Demurrer makes it peremptory, 22 H. 6. f. 55. Roll Iuſtice, The Book cited is againſt you, and in

Difference. 50 E. 3. f. 20. There is a difference taken between the delay of the Court, and the delay of the party; and here is no delay in the party, for he might have been forced by the rules of the Court to haſten the proceedings, and the Book of 34 H. 6. is againſt you. The Plea in Abatement ought not to have been received after imparlance, but if it be received, & a Demurrer upon it, it

Plea. cannot be helped and if one plead a Plea after imparlance, which ought not to be pleaded, the Plaintiff may pray the Court to over-rule it: but if he demur upon it, he admits that the Plea may be; and one may plead a Plea in Bar by way of abatement, & e contra. Therefore let the Defendant plead in Chief, if cauſe be not ſhewed on Friday to the contrary.

Burges againſt Dynham.

Trin. 24 Car. Banc. Reg.

Hill. 23 Car. rot. 1191.

Demurrer upon a Plea of Iuſtification.

BUrges brought an Action of Treſpaſs againſt Dynham for taking 24 load of Tymber. The Defendant juſtifies, that he took the Tymber as a Deputy of a Purveyour to the King, for the reparations of the Manſion houſes of the King. To this Plea of Juſtification, the Plaintiff demurs, and for cauſe thereth, that it doth not appear, that the Defendant hath any authority by the Common-law, or by Statute to take this Tymber: for the Com-

Commiſſion. miſſion which gives this authority ought to be renewed every ſix Months, and it doth not appear that it was ſo in this Caſe, 2 Inſtitut. f. 545. 10 E. 4. 2, 3. 2ly. He hath not ſhewed that the Houſes were in decay when he took the Tymber, and he cannot take it to make a Common ſtock, to repair them

Purveyours. afterward when they ſhould fall to decay. 3ly. Purveyours ought to pay ready mony for the commodities they take, and he doth not ſhew in our Caſe that he paid ready mony for the Tymber, by the Stat. 36 Ed. 3. C. 22. 47 Ed. 3. f. 8. but by 22 Ed. 3. Tit. Bar. 259. it ſeems to be otherwiſe: but the Caſe there differs from this Caſe, for there it was that a Purveyour may take Horſes to uſe for a time, without paying mony: but it was not to alter the property.

property. 4ly. He hath not shewed that he endeboured to agree with the Plaintiff for his Timber, as he ought to have done. Hill. 2 Car. rot. 509. Parker and Sturgens case. 5ly. The plea is huddled up, and is not pleaded particularly and distinctly as it ought to be, so that the Plaintiff knows not how to take an issue, 10 H. 7. The rule of Court was to hear the other side Friday next. Plea.

Brereton and Monington.

Trin 24 Car, Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an inferiour Court, and the Error assigned was, that the Plaint was entred against Francis, and the proceedings were against John. Roll Iustice said, that it was not good, for a Plaint is in the nature of an original writ, and therefore if that be erroneous it cannot be helpedthough it be after a verdict. And therefore shew cause Saturday next why the Iudgement should not be reversed. Error to reverse a judgement given in an inferiour court. Plaint. Amendment.

Gallop against Symson.

Trin. 24 Car. Banc. Reg.

CHase brings an Action of Trover and Conversion against Gallop, and his wife, and a stranger, in the Common pleas, and hath a verdict, and a Judgement against them. The Defendant brings a writ of Error to reverse this Judgement, and assigns for Error that the Plaintiff declares that the goods for which the Action is brought, venerunt ad usum ipsorum, viz. of the Husband, and his wife, and the stranger, which cannot be, for they cannot be said to come to the use of a Feme covert. Roll Iustice, This is not good, for he ought not to declare that the goods came to the use of the Feme, but to the use of the Husband only. And therefore reversetur judicium, except cause shewn to the contrary Saturday next. Error to reverse a judgement in a trover and conversion. Declaration.

Wainewright and VVhitly.

Trin. 24 Car. Banc. Reg.

VVAinewright brought an Action upon the Case against Whitly; for these words spoken of him; Thou art a theef, and hast broke my Chest; The Plaintiff hath a verdict, The Defendant in arrest of Judgement moves that the words are not actionable. But Roll Iustice said, notwithstanding my Lord Hobarts opinion, he held the words are actionable, for the word and is cumulative, and aggravates the former words, are not barely explanatory, and the subsequent words are violent, and may very well stand with the former. Therefore let the Plaintiff takehis Iudgement. Arrest of Judgement in an action upon the case. Cumulative. Explanatory.

The King and Camell.

Trin. 24 Car. Banc Reg.

An arraignment for witch-craft.

ANn Camell endicted at Southwold in Suffolk for Felony and Witchcraft was brought to the Bar by an habeas corpus, and was here arraigned. The prisoner desired Walker for her Councel. Roll Iustice asked her for what cause and matter she did desire Councell; To which the prisoner making no answer, Roll Iustice viewed the Endictment, and upon that assigned her Walker for her Councel, and gave him the next day to shew his exceptions against the Endictment, at which time Walker desired that the Endictment might be read, which was done, and upon the reading of it he took these exceptions. 1. To the caption wherein it is expressed, that the Endictment was taken in pena cessione, where it should be in plena cessione. To this Roll answered, if the word pena be left out, the Endictment is good enough without it, and therefore passes ouster. A second exception was, that the Endictment doth not say that the Iustices before whom it was taken were justiciarii ad pacem tenendam in villa prædicta, and then they might have no power to find the Endictment; but this exception was also over-ruled by the Court. A third exception was, That the Endictment is too general, for it only sayes that the prisoner practicavit diabolicas artes, and doth not expresse what. To this Roll Iustice answered, that the employing of wicked spirits to any intent whatsoever is Felony within the Statute, and the intent why they were employed is well expressed in the Endictment, and if an Endictment fail in one part, it may be good in another: and therefore the Endictment is good, and the prisoner must plead; Whereupon the prisoner pleaded not guilty. Upon this Walker moved the Court that this was an old Endictment, and that the prisoner had been twice acquitted upon other Endictments of the same nature, and that this was prosecuted for malice, and prayed that the prisoner might be bailed, which was granted. And she was bailed by her Husband, and by one Zachary Baggs a sufficient Citizen and Fishmonger of London, and two others, to appear at the next Assises to be held for the County of Suffolk.

Endictment.

Felony.

Bail.

Trin. 24 Car. Banc. Reg

To quash an Endictment upon the Statute of perjury.

THe Court was moved to quash an Endictment exhibited upon the Statute of perjury at Kingston upon Thames for these exceptions. 1. It is not expressed in what County Kingston is; and 2ly. the Endictment doth not expresse how the party is perjured, for it shews not in what cause it was not that it was in giving any evidence upon oath as a witnesse in any cause. Vpon these exceptions the Endictment was quashed. Nota

Butler,

Butler against Long.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 496.

LOng brought an Action of Trespasse against Butler in the City of and hath a verdict and a Judgement, the Defendant brings a writ of Error to reverse this Judgement, and assigns for Error, 1. That the Declaration doth not shew in what Parish within the City the Trespasse was done, as he ought. To this Roll Iustice answered, That it shall not be intended that there are more Parishes within the City than one, except the contrary be shewn. 2ly. The Declaration est quod cum talis, viz. the Defendant, &c. which is not an expresse averment, that the Defendant did the Trespasse; but it is set forth only by way of circumstance that he did it, which is not good, for he ought to be charged directly with it. Roll Iustice, The setting forth the Trespasse by a quod cum is not good, though in another Action it may be good. Therefore let the Iudgement be reversed, except cause shewn to the contrary Saturday next.

Error to reverse a Judgement given in an inferiour Court.

Intention.

Declaration. Trespasse.

VValker and Alder.

Trin. 24 Car. Banc. Reg.

ALder had a Iudgement and an Execution against Walker, and thereupon he was taken, and in custody in the Kings Bench prison. Alder the Plaintiff afterwards consented that the Defendant Walker should come to him out of prison to the Horshoe Tavern, which was out of the Rule, without a Keeper or rule of Court; thinking to make some agreement with him. The Defendant accordingly went thither, but because no agreement could be made, The Plaintiff takes the Defendant again upon the same Execution, and layes him again in the Kings Bench, the Defendant thereupon brings his audita querela; And adjudged by the Court to be well brought for the Execution was discharged by the Prisoners going at large, and therefore he could not be again taken upon it.

Auditaquerela for one taken twice upon one execution

Audita querela. Discharge.

Reader against Palmer.

Trin. 24 Car. Banc. Reg.

READer brought an Action upon the Case against Palmer, and hath a verdict, the Defendant moved in arrest of Iudgement that the Plaintiff altered his Declaration in the consideration of the promise, and in the promise it self, after he had pleaded, so that thereby the same issue which is tryed, is not that which was joyned. Twisden of Councell with the Plaintiff said, that the issue was not altered, for the words altered are not material words. Wild of Councell with the Defendant said, the issue was altered by alteration of the words, for the Action is brought upon a special promise, and not upon a promise in Law, as the altering of the words have made the promise to be, and therefore it is a material alteration. Roll Iustice said, it is a material thing that is altered, and it ought not to be amended; An Actual promise, and a consideration continuing, cannot be taken

Arrest of Iudgement in action upon the case for altering the Declaratio.

Amendment.

ken to be at another time. Hodg and Vavisors case, 14 Iac. Barton and Shurlyes case, Mich. 15 Car. And therefore give new rules to plead, and so proceed according to the course to a new tryal.

VVolverly Strachy against

Trin 24 Car. Banc. Reg.

Demurrer upon a plea in an action for scandalous words. Plea.

VVOlverly Strachy brought an Action upon the Case against the Defendant, & declared, that whereas she was a woman of agood fame, and honest reputation, &c. The Defendant spake these words of her, viz. she is a common Whore, and I will prove her one, by reason whereof she lost her credit and reputation, and her mariage. The Defendant pleaded that she was not of an honest reputation at the time when he spake these words of her, as is alleged in the Declaration: The Plaintiff demurs generally to this plea. Iudgement was given for the Plaintiff, except cause should be shewed Saturday next to the contrary. Antea

and the Lord Moone.

Trin. 24 Car. Banc. Reg.

For a supersedeas for a Peer of the Realm. Supersedeas. Privilege.

My Lord Moone had a Sute commenced against him in this Court; and thereupon he moves by his Councel upon an affidavit that he was a Peer of the Realm, and a Lord of the Parliament, and therefore ought not to be sued, and prayes for a supersedeas to stay the proceedings. Roll Iustice, Plead your privilege, for upon an affidavit we will make no rule, or else acquaint the other party that he is a Peer of the Realm, and it is like he will forbear to proceed thereupon. But you ought not to trouble the Court with such motions as these.

Cornish against Cowsye.

Trin. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1434.

Special verdict in Debt for rent against an Executor.

COrnish brought an Action of Debt against Cowsye an Executor, for arrerages of rent incurred, part in the life of the Testator, and part in the time of the Executor. The Plaintiff declares upon a lease made by him to the Testator by his Indenture made the first of May in such a year, &c. The Defendant pleads nil debet, and upon this a speciall verdict was found to this effect, That the Plaintiff did upon the first day of May, make the Indenture of lease to the Testator of the lands let, to have and to hold, a die datus, for and during the term of 7 years, from our Lady day last past, from henceforth fully to be compleat and ended, upon this verdict, the question insisted upon by the Councell was, whether there be not such a variance between the lease, upon which the Plaintiff hath declared, and the lease found in the verdict, that they shall be said to be several leases, or whether it shall be adjudged one and the same lease. Twisden for the Defendant held that there is such a variance between the lease in the Declaration, and the lease found in the verdict, that they cannot be the same, and

Variance.

so

so the Plaintiff can have no Judgement, and he urged this ground of Law that a deed shall be so construed that all parts of it may be made to stand together if it be possible without forced construction of the words; but this cannot be here, and a Lessor may make a lease to begin when he pleaseth, and end when he pleaseth, notwithstanding the date of it, and a lease made to begin at a day past, doth begin in interest in present, though not in computation. and he cited Musgraves case, Hob. rep. where two computations are in a lease for years, and one is repugnant to the other, the last shall be rejected. Hales of Councell with the Plaintiff held, that the lease begins in point of interest from the day of the date, and that there is no variance, or repugnancy between the lease mentioned in the Declaration, and the lease found in the verdict, and therefore the verdict is for the Plaintiff. Roll Iustice said, it would be hard for him to maintain it, and said, that in presumption of Law, when a thing is to be done upon one day, all that day is allowed to do it in for the avoiding of fractions in time, which the Law admits not of, but in case of necessity, Hill. 14 Jac. More and Musgrave Mich. 10 Iac. rot. 76 in the Exchequer. A Demise the 5 of May, by Indenture dated the 4 of May, habendum from the feast of the Annunciation last past, for 21 years, to have and to hold from the day of the date of these presents. But there are other points in the Case at the Bar to be considered of, for the Action of Debt is for rent, part incurred in time of the Testator, and part in time of the Executor. and it is in the detinet, which ought not to have been; but I conceive that that is here helped by the verdict, yet it is worth consideration: And he said, that an Executor cannot waive a Term if he have not assets, but if he have he may. Another thing here considerable is, that the Action is brought in the detinet, and the Defendant pleads nil debet; Yet he said, that after a verdict it might be good enough, for it is a Debt though the Action be brought in the detinet, Trin. 10 Car. 1289. Porter and Iarvis Banc. Reg. and he said that the Plaintiff hath mistaken his lease, yet I will advise by reason of the opinion in Musgraves case, Hob. rep. It is a lease in computation of time, from the sealing, and according to the habendum a livery and seisin habendum a die datus delivered the next day is good, if it be made by the party; but it is questioned whether it be so, if it be made by an Attorney. An antient deed which cannot be proved, shall be intended to be delivered the last hour of the day, to make good the conveyance. But I will take a little time to advise.

Lease for years.

Presumption.

Fraction.

Detinet.

Waiver.

Lease. Livery and seisin.

Raw against Raw.

Trin. 24 Car. Banc. Reg.

RAw had a judgement in an Action of Debt brought for arrerages upon an accompt in Newcastle upon Tyne against Raw, the Defendant brought a Writ of Error to reverse this Judgement, and assigned for Error, 1. In the issuing out of the venire, it is not said to be per Majorem prædictum villæ prædictæ; but per Majorem generally. 2ly. It is said, ad re co cognoscendum instead of recognoscendum. 3ly. It is said the Jury assidunt damna de prædict. who is not named before, for it is assidunt damna ipsius Katharinæ Carr, whereas she was before called Katharine Raw, and so damages are given to no certain person, for they have different names. Roll Iustice said, the surname Carr is void, and it shall be taken as if it had been said ipsius Katharinæ only, and that is good enough. But examine the transcript

Error to reverse a Iudgement in Debt upon arrerages of an accompt.

Venire.

Damages.

ſcript by the Record, whether the word be re co cognoſcendum or not, for if it be ſo, it is not good.

Lovell againſt Knatchford.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 348.

Error to reverſe a Judgement for Error in the Poſtea. Commiſsion.

KNatchford had a Judgement in the Common-pleas againſt Lovell. The Defendant brings a Writ of Error to reverſe this Judgement. The Error aſsigned was in the Poſtea, in that it is not ſaid that the Juſtice of Aſsiſe Aſſociato ſibi, &c. as it ought to be by the Statute. Roll Iuſtice ſaid, the Juſtice of Aſsiſe may have a ſpecial Commiſsion to go the Circuit alone, and then it muſt not be ſaid ſo, but if it be per formam Statuti, it ought to be aſſociato ſibi, &c. But the Clark of the Aſsiſe may bring in his notes by which he made the Poſtea, and amend it by them: for it is his fault to make the Retorn ſo.

Amendment.

Trin. 24 Car. Banc. Reg.

Plaintiff moves to diſcontinue his action. Diſcontinuance.

AN Action of Debt was brought upon an Obligation to ſtand to an Award; The Plaintiff ſhewed to the Court, that the Award made was not under hand and ſeal, according to the ſubmiſsion, and therefore he had no cauſe of Action, and prayed that he might diſcontinue his Action. Roll Iuſtice anſwered, it is in an Award, and I will do nothing in it: but if it were upon a Debt, it might be the Debt remains, though the Award be ill, but Judgement is not demanded, I will do nothing in it.

Newton againſt Bales.

Trin. 24 Car. Banc. Reg.

Paſc. 24 Car. rot. 183, or 178.

Error to reverſe a Judgement in an Act on on the Caſe.

BAles had a Judgement againſt Newton, in an Action upon the Caſe upon an Aſſumpſit in the Court at Owſe-bridge in York. The Defendant brings a Writ of Error to reverſe this Judgement, and aſsigns theſe Errors, 1. It is ſaid, the Defendant was to deliver certain commodities ad ratum, inſtead of ſecundum ratum. But to this Roll Iuſtice ſaid, that ad ratum & ſecundum ratum are all one in ſignification. 2ly. There is no time ſet forth when the promiſe was made, for it is ſet down in figures, which is all one as if it were not ſet down at all. Roll Iuſtice, The Record is not ſo, though the tranſcript be, therefore that may be amended. 3ly. There are two ſeveral promiſes, and they are both alleged. Roll Iuſtice, Its well enough. 4ly. The Venire is not returned, for it is not returned to be in omnibus ſervitum & executum. To this the Counſel on the other ſide anſwered, it appears that there is a panell returned, and therefore it is well enough, though thoſe words be omitted. Roll Iuſtice, The panel is not returned, nor anner-

Amendment.

Retorn.

ed

ed according the Statute, and therefore it is no return in Law. Therefore let the Iudgement be reversed for this cause, except cause shewed to the contrary,

VVatson against Scotson.

Trin. 24 Car. Banc. Reg.

VPon a suit between Scotson and Watson in the Court of Admiralty, Scotson entred into an Obligation to Watson. Watson brings an Action of Debt upon this Obligation in this Court against Scotson. Scotson appears, and puts in bayl to the Action, and after moves the Court, that Watson may be ordered to proceed in the Admiralty upon this Obligation, in regard the Bond was given there, and that the bayl here may be discharged. Roll Iustice, I will not release the bayl: for it is filed, and it is a Record here, and it is not unduly done.

To discontinue an Action, and to discharge the Bayl.

Discharge.

Bayl.

Aylet against Oates.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 397.

A Iudgement was given in the Common-pleas in an Action of Assault and Battery against three. The Defendant brings a Writ of Error to reverse this Iudgement, and assigned for Error, that the Action was brought against three, and that they all appeared by Attorny, and pleaded, whereas one of them was an Infant within age, and ought to have pleaded by his Guardian, and that Iudgement was entirely given against them all, which must be void against the Infant, and so it being intire is void also to the two other Defendants. Wild of Counsel with the Defendant in the Writ of Error argued, that the Iudgement may be reversed in part, viz. as to the Infant, and yet may stand good against the other Defendants: for the Action might have been brought against them severally as well as joyntly, 35 H. 6. f. 21. 5 Ed. 4. f. 7. Roll Iustice said, it is ruled contrary. Where a Iudgment is reversed for an error in Law against some of the Defendants, it is reversed against all of them: but it seems to be otherwise where it is reversed for an Error in Fact, 35 H. 6. 2. Hales on the other side moved to reverse the Iudgement wholly; for it is an entire Iudgement and cannot be reversed in part only: for all the Defendants are equally concerned in it, and a discontinuance against one of them reverses the Iudgement against all of them, and he denyed the Book of 5 Ed. 4. and cited 29 Ed. 3. f. 39. Roll Iustice said, if it be a Iudgement at the Common-law, or a Iudgement where costs are given by the Statute, if it be reversed as to one, it is reversed to all. And here is an entire judgement given by the Common-law, and it cannot be helped. But bring me the Book. Postea.

Error to reverse a judgment in Assault and Battery.

Iudgement.

Discontinuance.

Error.

Crook against Samm.

Trin. 24 Car. Banc. Reg.

Mich. 23 Car. rot. 311.

Error to reverse a Judgment in an Eject. firmæ.

SAmm had a Judgement in the Common-pleas upon a Nihil dicit in an Ejectione firmæ. The Defendant brought a Writ of Error to reverse the Judgement, and assigned the general Error. The Plaintiff in the Judgement prayed it might be affirmed, Roll Justice demanded of him, if it be a Judgement upon a Nihil dicit how can it be of this Term? Therefore give notice and move again. But the Judgement is, ideo consideratum est quod recuperet, and there wants & defendens capiatur, and therefore the Judgement is erroneous, and how can it then be affirmed? 3 Car. in the Exchequer, Mich. 5 Iac. rot. 269. Allens Case, 17 Car. Stewart and Stewart in the C. B. and though it be a Judgement by default, yet it is a Judgement, but being erroneous it cannot be affirmed. Therefore advise what you will do.

Judgement.

Error.

Hobart against Borafton.

Trin. 24 Car. Banc. Reg.

Arrest of Judgment in Debt upon the Star. of 2 Ed. 6. for not setting forth of Tithes. Copy.

IN an Action of Debt brought upon the Statute of 2 Ed. 6. for not setting forth of Tithes, after a verdict, It was moved in arrest of Judgement, that the Statute was not well recited: for the Parliament began in the first year of Ed. 6. and was prorogued, and the Act was made the 26th of November. and not the fourth, as it is set forth to be. For proof of this a Copy of the Parliament-roll, and an Affidavit to prove the Copy to be true were read in the Court. Hales of Counsel on the other side said, that the Copy was taken out of the Parliament-Journal-book only and not out of the Writ for prorogation of the Parliament, as it ought to be. Roll Justice said to the Counsel on the other side, Advise you how to answer this, and let the Judgement stay in the mean time. antea.

Pimley against Robinson.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 476.

Error to reverse a Judgement in Trespass vi & armis in York.

RObinson brought an Action of Trespass against Pimpley, for entring into his Close, and taking away a Mare and a Bridle, in the County of York, and had a verdict, and a Judgement against the Defendant. The Defendant brings a Writ of Error to reverse this Judgement, and assigns for Error, that the Court was said to be held on Saturday the ninth of November, whereas the Saturday on which the Court was held, was not the 9th. day of November, but the 7th. and so there is no Court alleged to be held, for on the 9th. day there was none held, 1 H. 7. 11 E. 4. 10. Roll Justice, It should seem they did not look well into the Almanack, if they had, this mistake had not been. Let the Judgement be reversed, except cause be shewn Monday next.

Error,

Mogg

Mogg against Shute.

Trin. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 2097

Error to reverse a judgement in Trespass.

Error.

IUdgement was given in an Action of Trespass, and a Writ of Error thereupon brought to reverse this Judgement, (and the Error assigned was, that the Venire was returned by one that was not Sheriff at the time of the return. To this it was said by the Councel on the other side, that this matter ought not to be assigned for Error, because it is against the Record: on the other side it was insisted upon, that he may assign it for Error. Roll Iustice said, it may be assigned for Error, but it is a Question how it shall be tryed: for it is not upon a Demurrer, and so the matter is not before us, 11 Car. Smith and Smith. And this cause ought not as it is to have been put into the Paper.

VVorsely against VVorsely.

Trin. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 489.

Demurrer upon a plea in an action of Accompt. Bar.

VVOrsely brought an Action of Accompt against Worsely. The Defendant pleads that the Plaintiff stands convicted upon the Statute made against Recusancy, and demands Iudgement Si actio. The Plaintiff demurs upon the Plea. Wild of Councel with the Plaintiff said, that this matter ought not to be pleaded in Bar of the Action, but he ought to conclude only Iudgement if he shall be answered. The Councel on the other side desired time to speak in it. Roll Iustice, Shew cause Monday next why Iudgement shall not be given against you

Trin. 24 Car. Banc. Reg.

For quashing an Endictment. County. Liberty.

THe Court was moved for the quashing of an Endictment upon the Statute of 8 Hen. 6. against forcible entries. The exception taken against it was that the Endictment doth not shew in what County the forcible Entry was upon which the Endictment was grounded. Roll Iustice answered, if it be within a Liberty, it is not necessary.

Trin. 24 Car. Banc. Reg.

For quashing an Endictment of perjury.

THe Court was moved to quash an endictment of Perjury against Stephen Burton. The Exceptions taken to the Endictment were these, 1. The Endictment is said to be taken in plena Sessione pacis, and it doth not appear to be the Quarter Sessions as by the Statute it ought. 2ly. It is said, that the Defendant dixit, &c. and doth not shew where or in what Plea he gave the evidence

vidence wherein the perjury was committed. 3ly. It doth not say, that the Defendant gave the evidence corruptive, as it ought to do. 4ly. The prejudice is not said to be ad grave damnum of any body, and so no body being prejudiced by it, none ought to be endicted for it. Roll Justice said, it is not enough to say the Endictment was taken in plena Cesione generally, but it must appear in what Sessions it was. Therefore let cause be shewn why it should not be quashed. It was afterwards quashed, because it did not shew, that any of the Justices before whom it was taken were of the Quorum, and not for the other exceptions.

Howard &

Trin. 24 Car. Banc. Reg.

Error in the Exchequer-Chamber to reverse a Judgement given in Deb in this Court. Bar.

Judgement.

A Judgement was given in an Action of Debt in this Court. The Defendant brings a Writ of Error in the Chequer Chamber to reverse this Judgement, and removes the Record thither. The Plaintiff brings an Action of Debt in this Court upon the Judgement given here. The Defendant pleads in bar of this Action Nul tiel record, and upon this the Plaintiff demurs, and the Court after motions and arguments on both sides, was by the Plaintiffs Councel moved for Judgement for him upon the Demurrer. But Roll Justice answered, If you will have a Curia advisare vult, you shall have it, if not, take your course, for the Record is not here before us; Therefore we can give no Judgement.

The King against Trigg.

Trin. 24 Car. Banc. Reg.

For quashing an Endictment for not being sworn a Headborow.

The Court was moved to quash a Presentment against Trigg for not going before a Justice of Peace to take the Oath of an Headborow, to which office he was chosen at a Leet. The Exceptions taken against it were, 1. That it doth not appear that any notice was given to him, to go before the Justice. 2ly. it appears not that the Justice had authority to administer the Oath. For the first exception the Presentment was quashed.

Collins against Page.

Trin. 24 Car. Banc. Reg.

Mich. 23 Car. ro. 269.

Error to reverse a Judgment in Debt, upon a Custom in Plymouth.

Forfeiture.

A Plaint was entred in the Court of Plymouth against Page for threescore pounds, and a pone taken out against his Goods, and upon this a default, and thereupon another pone issued out to attatch the Defendants Goods; and the Defendant at three other Courts successively makes default, and upon the fourth default Judgement was given against him; Whereupon the Defendant brings a Writ of Error in this Court to reverse the Judgement, and assigns for Error, that here is a Judgement given before any appearance, which cannot be, but in this Case the Goods attatched are only forfeited for the default made by the Defendants non-appearance. The Councel on the other side desired time to answer the exception.

Roll

Roll Iustice. The Custom upon which this judgement is given is not reasonable. Therefore if you answer not the exception Tuesday next, the Iudgement shall be reversed. Custom.

Skete against Clay.

Trin. 24 Car Banc. Reg.

Pasc. 24 Car. rot. 180.

CLay brought an Action of Trespass against Skete for taking away his goods, and had a verdict and a Judgement in the Common Pleas. The Defendant brought a writ of Error to reverse this judgement; and the Errors assigned were to the Declaration, because it had not proper latine words to expresse the goods; for 1. it is said that the Plaintif took away decem Velamina, Anglice Coffes, whereas Velamina signifies coverings generally. 2. Pilum is used for Pileum, in English a Cap. 3. Decem Colores, Anglice Neckbands. 4. Cruralia, Anglice Garters. 5. He declares de uno instrumento, Anglice a Plate, for a Jack. And 6ly. Pro uno operimento, Anglice a Rayl. But Roll Iustice said, We must not be too curious to expresse all things in Latin words in all Cases, for it cannot be done, and therefore a description with an Anglice must serve, and so it may here, therefore let the Plaintif have his Iudgement. Error to reverse a Iudgement in Trespass. Decl. ration. Description.

Aylet against Oats.

Trin. 24 Car. Banc. Reg.

THis Case was moved again, and upon view of the Book Roll Iustice held, that the Judgement was entire, and ought to be reversed for the whole, although it be good in some part of it; and he cited Trin. 14 Car. Scudamore and Scudamores Case, 8 Car. Gritewel & Morefields Case, & Trin. 11 Car. Eltonhead and Deerhams Case, and Trin. 7 Iac. rot. 566. Bird and Ormes case, and 5. Rep. Specots Case, and 13 Car. Dye and Atkins Case, and upon these authorities the judgement was reversed. Error to reverse a Iudgement entire, good in part, and ill to other part.

Sir Charls Coot against Plunket.

Trin. 24 Car. Banc. Reg.

THe Court was moved on the part of the Defendant, that the Plaintif had declared upon an obligation with a condition, but had not set it forth in the Declaration, and therefore desired that he may either have Oyer of it, or else that the Declaration being imperfect, so that he cannot plead, and he being now in prison, may otherwise be set at large. Roll Iustice, We cannot compell the Plaintif to set forth the condition of the Obligation; but till he doth the Defendant shall not be compelled to plead, and let the Plaintif shew cause upon notice given to him, why the Defendant shall not goe at large upon Common bail. It was moved again, and then Roll Iustice said, If you arrest one, and doe not proceed in three Terms, he ought to goe out upon Common Bail. But move it again to morrow. To be discharged upon Common Bail. Plea. Common Bail.

Trin. 24 Car. Banc. Reg.

To quash an endictment of perjury.

THe Court was moved to quash an Endictment upon the Statute of 5 Eliz. against perjury. The exceptions taken against it, were, 1. The Endictment saith, the Oath was taken before Baron Atkins and Serjeant Turner, but it doth not say where, viz. whether it were at the Sessions, or Assizes. 2ly. It saith the Oath was taken Coram Iusticiariis Domini Regis, but it doth not express what Iustices they were. The Endictment was quashed for the first Exception.

The King against Bellingham.

Trin 24 Car. Banc. Reg.

For moderation of a fine upon conviction for perjury.

BEllingham was indicted upon the Statute of 5 Eliz. against perjury, and pleaded Not Guilty, and was found Guilty. The Case was this, Bellingham had a Process delivered him out of the Court of Wards to serve upon one, which he did accordingly; and upon the return thereof he made Oath that he served the Process upon the party the 8th. day of the Month, whereas it was the 9th. day but it appeared upon examination of the matter, that the Oath was not taken malitiously, but only rashly; and upon this the Court was moved to set a moderate fine. Roll Iustice said, because it was so, therefore let the fine be but 10 l.

Fine.

Gallop against Chase.

Trin. 24. Car. Banc. Reg.

Pasch. 24. Car. rot. 250.

Error to reverse a judgement in Trover and Conversion.

THe Case of Chase and Gallop was again moved, which was this. Chase brought an action of Trover and Conversion in the Common Pleas against Gallop and his wife, and a Stranger; and declares that the Baron and Feme and the Stranger converterunt ad usum suum proprium. The Plaintiff had a Verdict and a Judgement; The Defendant brings a Writ of Error to reverse this Judgement, and assigns for Error, that the Declaration is not good, for it declares of a Conversion made by the Feme to her own use, which cannot be, she being a Feme Covert. Roll Iustice said, The Declaration doth intend, that all the Defendants did convert the goods, which cannot be, for the Feme cannot convert them, and cited Crow and Bakers case 1 Caroli & 7 H. 7. f. 3. Therefore let the Iudgement be reversed.

Declaration. Feme Covert. Conversion.

Trin. 24. Car. Banc. Reg.

For a *Certiorari*.

THe Court was moved for a Certiorari to remove an Order of Sessions made for the electing of one to be a Constable, that the Order may be confirmed here, and the Constable compelled to be sworn. Roll Iustice an-

answered, That by granting it the execution of Justice by the Justices in the Country will be hindred, therefore appeal to the Justices of Assize, for we will not grant a Certiorari. Upon this a writ was prayed out of this Court to compell the Constable to be sworn, which was granted. Mandamus.

Trin. 24 Car. Banc. Reg.

Whether a Writ of Error good.

A Judgement was given in the Common Pleas in an ejectione firmæ quod recuperet, a writ of Enquiry taken out; but before it was executed and retorned the Defendant brought a writ of Error; and the question was whether the writ of Error lay or no. Turner of Counsel with the Defendant in the writ of Error argued, that it did not lie, because the Original writ was not determined when the writ of Error was brought, and so the Judgement was not perfect or compleat, and consequently a writ of Error could not be brought to reverse it, and that the writ is not determined nor the Judgement perfect, is proved, because the Action being an ejectione firmæ here is no costs and damages found, nor is there any habere facias possessionem retorned, which are the fruits of the judgement, and and he cited 34 H. 8. f. 18. 39 H. 8. Fitz. Error 40. 36 & 37 Eliz. in the Common Pleas, Year and Peverells Case, 16 Car. Banc. Reg. But Roll Justice said, here is ideo consideratum est quod recuperet, which is a perfect Judgement, but it had not been so if the Judgement had been quod recuperare debeat, and it is in your power whether you will have a writ of enquiry or not, and if the judgement be affirmed here upon the writ of Error brought you may have a writ of enquiry here in this Court. The Counsel thereupon moved for a Certiorari. Roll Justice, Take it but it will doe you no good, for the judgement is well. Judgement. Brev. d' enquiry.

Stent against

Trin. 24 Car. Banc. Reg.

STent brought an Action upon the case for speaking these scandalous words of him, Thou art a pick-pocket Rogue and hast picked thy masters pocket and his Money-box, and I will prove it. The Plaintif had a Verdict. The Defendant moved in arrest of judgement that the words are not actionable, for that they are too general and uncertain. The Judgement was arrested till the Plaintif should move. Arrest of Judgement in an Action for scandalous words.

Trin. 24. Car. Banc. Reg.

For a *Supersedeas* to a *Certiorari*.

A Certiorari was granted out of this Court to remove certain endictments of forcible entries, whereas in truth there were no Endictments of forcible entry found against the party; upon this a Supersedeas was prayed to supersede the Certiorari. Roll Justice, This Certiorari was gotten by way of pervention for what might be done, but take a Procedendo to the Justices to proceed notwithstanding the Certiorari. *Procedendo*.

Trin.

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For the Defendant to plead in chief after imparlance.

A Scire facias was taken out to revive a judgement, and to have execution: The Defendant appears and imparls, and after imparlance pleads in abatement of the Scire facias, that the Plaintif had taken out a former Scire facias for the same cause, which is yet depending. It was moved for the Plaintif, that the Defendant ought not to plead this plea in abatement after imparlance, but that he ought to plead in chief. Roll Iustice, Let him plead such a plea as he will abide by within a week, or else let the Plaintif take his judgement.

Trin. 24 Car. Banc. Reg.

For a Steward of a Court to bring in the Court Rolls.

A Copyholder being sued in this Court for certain lands, moved, that the Steward of his Lords Court, to whom he was a Copyholder, might be ordered to bring in the Court-Rolls into this Court, that by them he may be the better enabled to defend his title to the lands. But Roll Iustice said, He cannot be ordered to doe it by this Court, therefore we will make no rule in it.

Trin. 24 Car. Banc. Reg.

Error to reverse a judgement in the Common Pleas for ent. Misnomer.

Deed.

An Action of Debt was brought for Rent in the Common Pleas, where the Plaintif had a Verdict and a judgement, and a Writ of Error was brought in this Court to reverse this Judgement: The Errors assigned were, 1. There is an Indenture recited to be between the Plaintif and John Barber, whereas it should have been John Barker. Roll Iustice answered, It may be that he is known by the one name, and the other, and then it is well enough. A second Exception was, It is said per indenturam signatam, and doth not say deliberatam, and then it is no deed if it be not delivered. To this Roll Iustice answered, If he say per factum suum, it is well enough, notwithstanding, for that implies it to be a perfect deed. 3ly. He declares for Rent of Houses in Kent street, and doth not shew in what Parish Kent street is. Adjourned.

Trin. 24 Car. Banc. Reg.

For a Habeas Corpus for a prisoner in execution.

The Court was moved for a habeas corpus for a Prisoner in the Kings Bench Prison, that he might be a witnesse in a cause to be tryed at the next Assises in Darby Shire. But Roll Iustice answered, we will grant no habeas corpus, for this is but a trick of the party himself to gain his Liberty that he may go a hawking and hunting this long vacation. But I have known it granted for one to be a witnesse at a trial at Yield Hall; but at the charges, and peril of the Party, for whom he was to be a witnesse, if he escape.

Mich.

Mich. 24 Car. Banc. Reg.

VPon a motion for a habeas Corpus for one in Execution upon a sentence given against him in the Court of the Admiralty, It was said by Roll Iustice, That if one be sued in the Admiralty to a sentence, and be in Execution upon it, and be brought hither by a habeas corpus; if upon the return it doth not appear that the Admiralty had not jurisdiction of the cause, but it appears only that they had proceeded to a sentence against the rules of their own Court, This Court will not deliver the Prisoner out of Execution, for he ought to have made his appeal, before he was taken in Execution. And so is it touching the proceedings in other Courts of equity.

For a habeas corpus for one in Execution upon a sentence in the Admiralty.

Appeal.

Cage.

Mich. 24 Car. Banc. Reg.

ONe Cage was in Execution in the Kings Bench upon a Judgement had against him for a hundred pound, The Plaintiffs Attorney by fraud without the consent of his Client acknowledgeth satisfaction upon this Judgement, afterwards the Attorney of the Defendant without the consent of his Client acknowledgeth another Judgement for the same Debt. The Plaintiffs Councel moved, that the Defendant might be in Execution upon the first Judgement, and that the satisfaction acknowledged thereupon, might be vacated. Roll Iustice answered, The Attorney ought to be committed for acknowledging the second Judgement without Warrant; But here are two frauds, one of each side, so that there is fraud against fraud, and so the partyes are left to their remedyes one against the other, but both the Attorneys shall be committed for their false practice. And we will examine the whole truth of the matter Saturday next.

To vacate a satisfaction acknowledged upon a Iudgement.

Commitment.

against Loveday.

Mich. 24 Car. Banc. Reg.

THe Court was moved upon an affidavit that one of the Jurors that gave the verdict against the Plaintiff had a suite in law depending at that time with the Plaintiff, and therefore that the tryal was not indifferent, and therefore it was prayed there might be a new tryall. But the Court said, it could not be, and asked the party why he did not challenge the Juror for this cause at the tryal, for want of which he had now lost that advantage.

For a new tryal after verd. & because a Iuror not indifferent.

challenge.

Tryal.

Stradling and his wife against Boreman.

Mich. 24 Car. Banc. Reg.

STradling and his wife brought an Action of Trespasse of Assault and battery, and taking of a horse, against Boreman, and the Plaintiffs declare ad damnum ipsorum, and have a verdict; the Defendant moved in arrest of Judgement, and shewed for cause that the Baron and Feme cannot joyn in

Arrest of judgement in Trespasse.

Joyn in Action.

this Action, but ought to bring severall Actions, for the wrong done to each was severall. The Iudgement was thereupon stayed till the Plaintiff should move.

Mich. 24 Car. Banc. Reg.

Arrest of Iuogement in an action upon the Case.

AN Action upon the Case was brought for speaking these words, He is gon and dares not shew himself for Debt, and he is a Banckrupt, for ought that I know; the Plaintiff had a verdict, the Defendant moves in arrest of Iudgement that the words are not actionable, because they are general, and uncertain. But the Court held that all the words taken together are actionable, but stayed the Iudgement for a week.

Mich. 24 Car. Banc. Reg.

Iurors move for their charges.

IUrors who appeared for a tryal at the Bar which fel off for want of a full Jury, prayed the Court they might have their charges, because they came a great way, and had attended long in town. The Court answered them, that it was their neighbours fault, who did not appear, that the tryal went not on, for both the partyes are ready, and if the cause had been tryed, you should have had all your charges. But now we can order nothing.

Mich. 24 Car. Banc. Reg.

Exception to an order, and fine of Sessions.

VPon a Return of a certiorari to remove an order of Sessions made against a Parish for not repairing of a high way, Hales of Counsel for the Parish took this exception, viz. That the fine was set upon the Parish without any processe issued out against the Parish, only upon a certificate of one of the Justices of the peace made upon his own view that the way was not repaired, and so the Parish was condemned before they were heard. To this the Court answered, That a Justice of Peace may make a certificate upon his own view, of the want of reparations of a Highway, by the Statute. Therefore bring a certificate that the way is repaired, else we will do nothing, for we must not be too hasty to overthrow such presentments which so much concern the publique good. And in this case if there be a conviction in law, and the fine levyed, we cannot help it, and now you cannot traverse, for it is too late.

Certificate.

Conviction.

Travers.

Sir Anthony Ashley Cooper against St. Iohn,

Mich. 24 Car. Banc. Reg.

Arrest of judgement in an action on the case.

SIr Anthony Ashley Cooper brought an Action of Trespasse upon the Case for false imprisonment of him against St. John, and hath a verdict against him; the Defendant moves in arrest of Iudgement, and takes this Exception

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tion to the Declaration that it wanted vi et armis which ought to have been, because this is not a meer Action upon the Case; but in its nature it is an Action of Trespasse, and therefore he ought to have been declared in with vi et armis. Roll Iustice answered, what say you to the Case, quare fr egit suum mill-dam, which hath been adjudged good without vi et armis, as well as with vi et armis? and in one case it shall be said to be an Action of Trespasse, viz. with the vi et armis, and in the other an Action upon the Case, viz. without the vi et armis; and Bacon Iustice cited the 9. rep. The Earl of Shrewsburyes Case. Roll Iustice, It is a plain Action upon the Case, as it may appear by reading of the Record, for it is with an et quod cum. Bacon Iustice said, one cannot have an Action of Trespasse for the breaking of another mans fence; but if he be damnified by the breaking of it, he may have an Action upon the Case against the party that broke it. Declaration. Trespasse, Case.

Ayre against Sils.

Mich. 24 Car. Banc. Reg.

AYre brought an Action upon the Case against Sils, upon a promise to pay certain arrerages of rent appearing due unto him upon an accompt made between him and the Defendant: The Plaintiff had a verdict. The Defendant moves in Arrest of Judgement, and for cause shews, that an Action upon the Case doth not ly upon a promise to pay rent appearing due upon accompt, for the rent was due by a reall contract, and upon that the Plaintiff had remedy without the promise. To this the Court said, that this Action doth not ly for rent alone due upon a real contract, but for the rent with other things it doth lye, yet let the Indgement be stayed, for there is here no new consideration appearing to ground this promise upon, but only the old consideration of Law for the payment of the rent, and upon that an Action of the Case doth not ly, for it is in the realty. Arrest of Iudgement in an action upon an assumpsit. Case.

Tomkins against Jourden.

Mich. 24 Car. Banc. Reg.

Trin. 24 Car. rot. 96.

A Writ of Error was brought to reverse a Judgment given in an inferiour Court, & these Errors were assigned. 1. It is said in the stile of the Court that the Court was held per consuetudinem et literas patences, which is not good, for the Court cannot be held by both. Roll Iustice, This is not goodly. Against the writ of Error it is objected by the other side, that the writ of Error is directed to one, and is returned by another, for the certiorari was to certifie a Judgement given before the Maior, Aldermen, and Recorder, and the Judgement certified, is a Judgement given before the Maior and the Aldermen, and the Recorder is left out, so that the Record is not removed, and then the Judgement cannot be affirmed. Roll Iustice said, the pleading is confused, and Bacon Iustice said, you have changed the stile of the Corporation by your pleading; If a Court be held by Custom, and after a patent be purchased to hold it, and they hold it by the patent, the Custom is gone; but bring us a Copy of the certificate of the stile of the Court, and in the mean time we will advise. Error to reverse a judgement given in an inferiour court. Custom.

Pickering against Barkley.

Mich. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 154.

Demurrer upon a plea in an action of covenant.

PIckering brought an Action of Covenant upon a deed of Covenants of Charter-party, whereby it was Covenanted that the Defendant in consideration of a certain sum of mony agreed to be paid to the Defendant, for fraight of a Ship should make such a voyage, and bear all losses and damage which should befall the Ship, or Merchandises in her, excepting only perils of the Sea, and declares that the Defendant had not performed his agreement, and for this he brings his Action. The Defendant pleads, that in the making of his voyage upon the Sea, the Ship was taken per quosdam ignotos homines bellicosos, whereby he was hindred in making of the voyage according to his agreement; to this plea the Plaintiff demurs. The question was in regard that in the Charter party perills of the Seas were excepted, whether the taking of the Ship by these, unknown men of War should be accompted a peril of the Sea, or not according to the meaning of Merchants. Twisden of Councel with the Plaintiff held it should not, and so the plea was not good, and that therefore the Plaintiff ought to have Judgment, and said, this was not a danger of the Sea. but a danger upon the Sea. 2ly. He said, the party (it may be) might have prevented it by vigilancy, or by making resistance, and so it may be it was his own fault the Ship was taken. 3ly. The men of Warr that took the Ship were peradventure English men, and then the Defendant is not to be excused, for he may have his remedy for what he is damnified, against them, and cited 33 H. 6. f. 1. and prayed Judgement for the Plaintiff. Hales of Councel with the Defendant held, that to be taken and robbed by Pirates is a danger of the Sea, even as tempestuous winds, and Shelfs, and Rocks are. And 2ly. To that it is said the pirates may be English men, we are not able to say of what Nation they were, and therefore our plea is good in that point also, and prayed Judgement for the Defendant. Roll Iustice said, it was not well pleaded to say per homines ignotos. Bacon Iustice said, The Defendant doth not shew that he and his Ship was carryed per locos incognitos, as he should have shewn; but Roll Iustice answered, that it may be the Ship is yet kept upon the Sea, but I suppose that Pirates are perils of the Sea, and to this purpose a certificate of Merchants was read in Court, that they were so esteemed amongst Merchants. Yet the Court desired to have Granly the Master of the Trinity house, and other sufficient Merchants to be brought into the Court to satisfie the Court viva voce Friday next following. Iudgement was given this Term nil capiat per billam, because the taking by Pirates are accompted perils of the Seas.

Plea.

Wood

Wood against Clemence.

Mich. 24 Car. Banc. Reg.

Hill. 22 Car. rot. 804.

WOod brought an Action of Debt upon an Obligation to stand to an award, against Clemence. The Defendant pleaded that the Arbitrators made no award: The Plaintif replies that the Umpire made an award, and sets it forth at large. The Defendant demurs, and for cause shews that it appears by the pleading that the Umpire was chosen before he ought to be; for it appears not that the Arbitrators could not agree in making the award, or that they had any power to make an Umpire. 2ly. The Award is made for satisfaction to the Owners and Mariners of the Ship, concerning which the submission was made, and one of them is the Plaintif in this Action, and they cannot arbitrate that the monies which concern one shall be paid to another, and so all the award is naught. Also here is nothing arbitrated concerning John Acon the Master of the Ship, who is one of the parties within the submission. Roll Iustice, As to the first Exception it is not a material one, as I conceive. But give a note of your exceptions to the Councel of the other side, and bring us Books. Postea.

Demurrer upon an award pleaded.

Award.

Frere and others against

Mich. 24 Car. Banc. Reg.

AN Action of Debt was brought for 1500 l. upon a deed of Charter-party. The Plaintif had a verdict. The Defendant moved in arrest of judgement, and offers for cause, that the Declaration was insufficient, for it appears not by it that the Defendant is indebted to the Plaintif, and then there is no cause of Action; for the Declaration only says, that he is indebted, as it appears, but shews not how. Roll Iustice said, it is by indenture, and well enough. Dyer 2, 3 Phil. and Mar. f. 148. Plowden 121, 122. Buckleys case 143. Browning and Beestons case 21 E. 4. f. 29, he said, either an action of debt, or an action of Covenant lies here, for it is upon a Charter-party. Here is not indeed a perfect allegation, yet it is well enough, for it hath been usually thus pleaded. Speak to it again Wednesday next.

Arrest of judgement in debt.

Debt. Covenant.

Dison against Bartue.

Mich. 24 Car. Banc. Reg.

DIson brought an action of Assault and Battery, and taking of his goods, against Bartue, and had a Verdict; the Defendant moved in arrest of Judgement, and shewed for cause that the Declaration was not good; for it is with a quod cum, &c. which in an action of trespass, vi et armis, is not good; for it is not a direct affirmative, that the Defendant did the Trespass; but it is only an implication that he did it, but as it is it might have been good if the action had been an action of Trespasse upon the case. The Iudgement was stayed till the Plaintif should move.

Arrest of Iudgement in Assault and Battery.

Mich. 24 Car. Banc. Reg.

Demurrer upon an Award pleaded.

AN Action of Debt was brought upon an Obligation to stand to an Award. The Defendant pleaded nullum arbitrium. The Plaintiff replies, and sets forth the Award, and assigns a breach; The Defendant demurs; The Plaintiff after demurrer moves the Court, that he might discontinue his Action. But the Court said, that after a demurrer upon an Arbitration, it is not usual to discontinue the Action. But let nil capiat per billam be entred, if cause be not shewed to the contrary.

Discontinuance.

Mich. 24 Car. Banc. Reg.

Arrest of Judgement by Baron and Feme.

AN Action of Debt was brought by Baron and Feme upon an Obligation made to the Feme dum sola fuit, and the Declaration is ad damnum ipsorum; The Plaintiffs had a verdict; The Defendant moves in arrest of Judgement, and for cause shews, that the Declaration should not be ad damnum ipsorum, but only ad damnum of the Husband only. But the Court held that the Declaration was well enough, and said, it is the usual way of declaring in such Actions, and the mony due upon the Obligation not being paid to the Feme whilest she was sole, it was dammage to her; and now being Covert it is a dammage to the Baron also, and so it is ad damnum ipsorum 16 E. 4. Therefore let the Plaintiff take his Judgement.

Declaration.

Quatermans Case.

Mich. 24 Car. Banc. Reg.

Antient use of practice altered.

IN the Case of one Quaterman, Roll Iustice said, that out of indulgence to the Bayl, it hath been the use of later times, that if the Bayl do bring in the principal before the return of the second Scire facias, which was taken out against the Bayl, thereupon to discharge the Bayl: but antiently it was not so, but it was then counted too late to bring him in.

Discharge.

Hill and Harris,

Mich. 24 Car. Banc. Reg.

Arrest of judgement in an action of Debt against Executors.

AN Action of Debt was brought against divers Executors. The Defendants pled fully administred, and upon this an Issue was joyned, and a verdict found for the Plaintiff. The Defendants moved in arrest of Judgement, that there is contrariety between the issue joyned, and the verdict found: for the Action is entire against all the Executors, and they had all pleaded fully administred, and upon this the issue was joyned, and the verdict finds that some of the Executors had fully administred, and that others of them had Goods in their hands, whereas the verdict should have been that they had not fully administred. The Iudgement was stayed till the Plaintiff should move.

Verdict.

Mich,

Mich. 24 Car. Banc. Reg.

Upon a rule of Court to shew cause why restitution should not be granted upon an Endictment of forcible entry, exception was taken to the Endictment, that it did not say, that the party entred illicite & manu forti, as the words of the Statute direct, and it was said, that in a forcible entry there ought to be an entry, expulsion, and detepner. Roll Iustice said, that there ought to be manu forti in the Endictment, according to the Statute, to distinguish this kind of Entry from an ordinary Trespass by entring into anothers Land, which is not so violent as a forceable entry is supposed to be. But let us see the Copy of the Endictment.

Cause why no restitution upon an endictment of forcible entry.

Endictment.

Gibbs against Dunn.

Mich. 24 Car. Banc. Reg.

Gibbs brought an Action upon the Case against Dunn, for these several words spoken of him by the Defendants Wife at several times, viz. thou art a thief for stealing my corn out of my Barn, and at another time for saying thou art a thief. The Plaintiff hath a verdict; The Defendant moved in arrest of Judgement, that entire dammages were given for both the words; whereas the first words were not actionable: for the Feme being a Feme Covert could have no Corn of her own, for it was her Husbands Corn, and so there could be no stealing of her Corn. But the Court answered, that in common intendment the Corn is hers and her Husbands Corn, though in legal construction it be not so, and the Scandal is great, although it appear that the words were spoken by a Feme covert. Therefore let the Plaintiff take his Iudgement, except cause be shewn to the contrary. Iudgement was given the same Term, because the last words were held to be accumulative.

Arrest of judgement in an action upon the Case for words.

Dammages entire.

Intendment.

Mich. 24 Car. Banc. Reg.

The Clark of the Errors in the Common-pleas attended here upon a rule of this Court, Whereupon one of the Clarks of the Court gave notice of it to the Court, and prayed he might be heard. But the Court answered, that Councel ought to move it, and not he.

A Clark of the Court ought not to move the Court.

The King against Doctor Trigg.

The Court was moved for Doctor Trigg to estreate the Fine into the Exchequer which was set upon him by the Court upon his conviction upon an information preferred against him upon the Statute for practising Physick in London, without a licence from the College of Physicians. Hales of Councel with the College of Physicians moves it may not be estreated, for it is not necessary, and here the Judgement is not only for the King: but it is tam pro rege, quam pro, &c. and so part of the Fine doth belong to the Sub-

For the estreating of a Fine.

Fine.

Estreat.

Subject, and for that part the Prosecutor may have a privy Seal here to recover it: but if it be estreated into the Exchequer he cannot there have it, and so he shall lose his reward, and therefore he desired the Fine might be respited. But the Court answered, we cannot respite the Kings part, nor the other part: for there is an execution out for the whole Fine which cannot be stayed.

Effica.

Heyford against Hobson.

Mich. 24 Car. Banc. Reg.

Arrest of Judgment in Trover and Conversion.

HEyford brought an Action of Trover and Conversion against Hobson in the Common-pleas for taking away and converting of divers of his Goods and Chattels particularly named, and had a verdict. The Defendant moved in arrest of Judgement, that the Declaration was incertain, for amongst other things the Plaintiff in his Declaration declares for the taking de duobus castoribus, Anglice Hats, whereas castor is not a proper word for a Hat. 2ly. de uno servitio argenteo, Anglice one silver Salt, and there is no such word for a Salt, but there is another proper Latin word for it, viz. salinarium. 3ly. De duobus catenis, Anglice two silver Dishes, which is no word for a Dish, much less a silver Dish. Roll Iustice said, one may describe a thing in a Declaration, if there be not a proper word to express it, and if it be so described that the Jury may know what is meant by it, it is well enough. But let the Iudgement be here be stayed, for we will advise.

Declaration.

Wood against Clemence.

Mich. 24 Car. Banc. Reg.

Exceptions to an award.

THis Case formerly (viz. this Term) moved and spoken to touching the validity of an Award made touching the fraight of a Ship, was again moved, and Exceptions taken to the Award. 1. That the award is repugnant in it self. And 2ly. It is not final, and so not good. The Court answered, if the Award be ill, as of your own shewing it is, then you have no cause of Action, and so you cannot have Judgement, although the Defendants bar be not good, and a submission made by one for himself, and another, is good to bind the party that submitted. But move it again, and we will advise in the mean time. Antea.

Iudgement. Submission.

Mich. 24 Car. Banc. Reg.

To quash an endictment of forcible entry.

THe Court was moved to quash an Endictment of forcible Entry after the party endicted had pleaded, and a verdict against him. Roll Iustice, We must not be so curious in the framing of Endictments, as to quash them for every small fault, and in this Case it was said by him, that if one interrupt a long possession by force, and the other regain it with undue means, an Endictment lies not against him for this, for this is but vim vi repellere, and after a verdict, and before Judgement upon an Endictment of forcible entry, the party ought not to move for restitution.

Endictment.

Restitution.

Baniſter against VVright.

Mich. 24 Car. Banc. Reg.

IN a Tryal at the Bar between Baniſter and Wright in an Action upon the Statute of 2 Ed. 6. for not ſetting forth of Tithes, It was ſaid by the Court that Tithes which lye not within any Pariſh are due to the King, and that Lands muſt be parcel of a Pariſh, either by preſcription, or by Act of Parliament, and that Lands lying within a Foreſt, and in the hands of the King do not pay Tithes, although they be within a Pariſh: but if the Lands be diſafforeſted, and be within a Pariſh, they ought to pay Tithes, for their not paying Tithes being in the hands of the King, is but an immunity for that time only.

Lands free from tithes.

Tithes.

Mich. 24 Car. Banc. Reg.

A Baker was preſented in a Court Leet for ſelling Bread under weight, and a Fine ſet upon him, and an action brought againſt him for this Fine, and a verdict given againſt him. It was moved in arreſt of Judgement, that the preſentment upon which the Action was founded was not good, and ſo there was no ground of Action, and ſo there ought to be no Judgment. But Roll Juſtice anſwered, that the Action is for the Amercement which is a collateral thing, and the preſentment is not now to be called in queſtion, if it be only avoidable for ſome fault in it: but it were otherwiſe, if the preſentment were utterly void. But ſpeak again to it at another time.

Arreſt of judgement in an action for a Fine ſet at a Court leet.

Fine.

Amercement.

Preſentment.

Mich. 24 Car. Banc. Reg.

THe Court was moved for a Habeas Corpus for one committed at Norwitch for Treaſon in ſpeaking words againſt the Queen, becauſe he could not be tryed there. Roll Juſtice anſwered, he cannot be endicted here, except the fact were done in Middleſex, therefore adviſe with the Kings Councel, and prefer a Bill of Endictment where the fact was, and then you ſhall have a Writ ad deliberandum directed to the place where the fact was, and this is at the Kings ſute, and the Sherif ſhall be allowed his charges upon his accompt, or elſe the Juſtices may try him by their Commiſſion of oyer and terminer.

For a Habeas corpus to remove a Priſoner committed for Treaſon.

Endictment.

Tryal.

Smith and Hancock, and others.

Mich. 24 Car. Banc. Reg.

SMith brought an Action of Treſpaſs againſt Hancock and others, for taking away divers parcels of Ribbin from him. The Defendants pleaded by way of Juſtification, the Cuſtom of London againſt Hawkers, viz. to take away Ware from any that ſold them up and down the Streets.

For a new tryal, becauſe of a miſtryal.

The Plaintiff replyed, that there was no such custom, and issue was taken upon it; thereupon the custom was certifyed by the mouth of the Recorder, & a tryal upon it in London, & a verdict for the Defendants. The Plaintiff moved in arrest of Judgement, that it was a mis-tryal, because it was before them that were interessed in the cause, and therefore desired there might be another tryal. Roll Iustice said, it is against natural equity, for one to be Judge in his own cause, although the other party admit it to be so, and therefore it is a mistryall, though it were at the request of the Plaintiff, because it is against natural reason, 8 E. 3. f. 69. 5 Ed. 3. 8. 9 H. 7. f. 21. Hil. 38 Eliz. in the Exchequer. The prayer of the Plaintiff cannot help the tryal, for the consent of both partyes cannot change the Law, much lesse the prayer of one of the partyes. Hales of Councel with the Defendants argued that it was not a mis-tryall, and said this concerns them in point of privilege of the City, and not meerly in point of interest, before whom the Judgment was given. 2ly. The consent of the party hath barred him of the advantage which otherwise he might have had. But Roll Iustice answered, here is point of interest as well as point of privilege, for part of the goods taken come to the benefit of the City, and therefore they ought not to be their own Judges, for this is against natural reason, and so it is a mistryal. But it doth not appear here whether the Maior and Aldermen be another Corporation or not, and distinct from the Corporation alleged, which certified this custom by the mouth of the Recorder, and this is the sole doubt in the Case. The Court ordered that there should be a new tryal except cause shewn to the contrary: Q. whether there shall be a Repleader, or a new venire.

Tryal.

White and his wife against Harwood and his wife.

Mich. 24 Car. Banc. Reg.

Whether a writ abated by death of one of the defendants. Abatement.

White and his wife brought an Action upon the Case for slanderous words, against Harwood and his wife; the Defendant dyes, the Feme takes another Husband pending the suit. It was moved that the writ was abated. The Court inclined that because the Defendant had by her mariage changed her name, therefore the Writ was abated, but took time to advise.

Slade.

Mich. 24 Car. Banc. Reg.

For Judgement stayed upon a Iudges certificat.

The Court was moved for Judgement formerly staied upon a certificate made by Baron Atkins, that the verdict passed against his opinion. Bacon Iustice said, Judgements have been arrested in the Common pleas, upon such certificates. Hales of Councell with the Defendant prayed, that this Judgement might be arrested, and that there might be a new tryal, for that it hath been done heretofore in like cases. But Roll Iustice held, it ought not to be staied, though it have been done in the Common pleas, for it was too Arbitrary for them to do it, and you may have your attaint against the Jury, and there is no other remedy in Law for you; but it were good to advise the party to suffer a new tryal for better satisfaction. And let the Defendant take four dayes from hence to speak in arrest of Iudgement if the postea be brought in, if not, then four dayes from the time it shall be brought in.

Attaint.

Andrews

Andrews against Baily.

Mich. 24 Car. Banc. Reg.

VPon a tryal at the Bar between Andrews and Baily, upon an ejectment leafe touching Sir Iohn Prowds title to lands. It was said, that a man cannot be a subject to two several Princes. And that denisation by letters patents do enable the party to purchase Lands, but not to inherit the Lands of his Ancestor as Heir at Law; But as a purchasor he may enjoy lands of his Ancestor.

Denisation by Letters patents to enable to purchase not to inherit lands. Denization. Inheritance.

Dunch against Smith and others.

Mich. 24 Car. Banc. Reg.

Hil. 23 Car. rot. 37.

DUnch brought an Action of Debt as an Executor for arrerages of a rent charge due to the Testator, against Smith and others the occuppers of the Land. The Defendants demur to the Declaration, and for cause shew that it doth not set forth what estate the Defendants have in the lands charged with the rent, and so it appears not that they are to pay the rent. Hales of Councell with the Plaintiff answered, that it is not necessary for the Plaintiff to set it forth, for he is a stranger to the Estate, & cannot know what Estate it is. Roll Iustice said, It doth not appear by the Declaration whether the Defendants claim under him that granted the rent or no. But move it again Saturday next. Postea.

Demurrer to a Declaration in Debt.

Smith against Hale.

Mich. 24 Car. Banc. Reg.

SMith brought an Action of Debt against Hale for rent; The Defendant pleaded that he is Tenant and Servant to the Lord Moone a Lord of the Parliament, and prayes his Writ of Privilege may be allowed. The Plaintiff demurs, It was argued by Barton of the middle Temple, that the plea was ill, for the very matter of it for the privilege is against the Common Law, and also against the Statute Law, and for proof cited 1 E. 1. f. 26. 2 E. 3. f. 3. 2 Ed. 6. C. 8. Roll Iustice answered, you ought not to argue generally against the Privilege of Parliament, for you know that every Court hath its privilege, as this Court also hath, therefore apply your self particularly to this question, whether a Writ of privilege belongs to a Parliament man so far as to protect his Lands and Estate, and I conceive he is so privileged; And you have admitted his privilege by your own Demurrer. But we will advise.

Demurrer to Privilege of Parliament. Privilege. Admittance.

Wright.

Mich. 24 Car. Banc. Reg.

AN Action of Debt was brought upon an Obligation to perform Articles; The Defendant pleaded Covenants performed: The Plaintiff had

Plaintiff after a verdict for him moves for a new tryal.

had a verdict, and after verdict, and before Judgement, he moved for a new tryal, because it appeared that there was no issue joyned; the Plaintiff moved it for his own expedition, for he feared if he should enter Judgement, that the Defendant would bring a Writ of Error. The Court answered, that there was a perfect issue joyned; but the pleading is not good, and it was your own fault to joyn issue upon such a pleading, when you might have demurred. Yet let the Defendant shew cause why he should not consent to a new tryal, and a Repleader.

Tryall.

Mich. 24 Car. Banc. Reg.

The Lord chief Iustice Roll first took his place.

MEmorandum on Wednesday the 14 of November 1648 Henry Roll Serjeant at law then one of the Iustices of this Bench took his place in Court as Lord chief Iustice of England, and Twisden moved for a day to plead between Dunch and Smith being the first motion that was made in Court after he took his place.

Popham against Hunt.

Mich. 24 Car. Banc. Reg:

Mich. 23 Car. rot. 558.

Demurrer to a Declaration in an action of Covenant.

POpham brings an Action of Covenant upon an Indenture against Hunt; the Defendant demurs to the Declaration, and the Plaintiff joyns in the Demurrer: Upon the pleading the Case appeared to be this, a Feme sole delivers a certain sum of mony into the hands of I. S. and the Defendant thereupon Covenants with the Feme to pay unto A. B. 100 l. a peer, so long as the mony should continue in the hands of I. S. The Feme takes Baron; The hundred pound per annum is arrere. The Baron makes his Executor, and dyes, and after his death the 100 l. a peer is behind also. Popham the Executor brings this Action of Covenant, and the question was whether the Action was well brought, and the Court held the Action did lye, for the Covenant doth concern the Executor, because he represents the Testator; but the question here is whether the rent due after the death of the Husband ought to be paid, and how it shall be known whether he be dead for it is not specially alleged, and if he be not dead there is no cause of Action. Therefore consider of this.

Covenant.

Bragg against Nightingall.

Mich. 24 Car. Banc. Reg.

Trin. 24 Car. rot. 601.

Demurrer to a Declaration in an action of covenant.

BRagg brought an Action of Covenant against Nightingall upon an Indenture. The Defendant demurs to the Declaration, The Case was this. The Plaintiff let by Indenture certain houses for divers years to the Defendant, and covenanted with him to repair the houses by such a day expressed in the Indenture. The Defendant by the same Indenture covenanted with the Plaintiff, that from the time that the Plaintiff was to repair

pair the houses, unto the end of the Term for which they were demised, he would well & sufficiently repair, and leave them so repaired at the end of the Term; for not performing of this Covenant, on the Defendants part the Plaintiff brought his Action. The cause shewed for the demurrer to the Declaration was, that the Plaintiff had not shewed that he on his part had repaired the houses according to his Covenant, and so the Defendant supposed he was not bound to repair, because he was to repair from the time the Plaintiff had repaired them, and not before, and so there is no cause of Action. After divers motions Roll chief Iustice said, That here was a reciprocal Covenant to be performed on each part, and although one do not perform the Covenant on his part, this doth not excuse the other party; but he is tyed to perform his Covenant nevertheless, and if he do not an Action lyes against him, and he may bring his Action also against the other that first broke his Covenant, and therefore the Action lyes here against the Defendant, and so the demurrer is not good upon the cause shewed. But if this were not a reciprocal Covenant the Law would be otherwise, and cited Hayes and Hayes Case 11 Car. and Skippon and Lucas his case 10 Car. But Bacon Iustice held the contrary that the demurrer was good, for that it appears that it was the intent of both parties that the Plaintiff should first repair, and after that the Defendant should keep the houses in repair. The Court would advise. Covenant

Smithson against VVells.

Mich. 24 Car. Banc. Reg.

SMithson brought an Action upon the Case upon a promise against Wells, and declared upon a promise made to save the Plaintiff harmless from such an obligation when he should be thereunto required. The Defendant pleaded non Assumpsit, and upon this a special verdict was found, viz. generally that the Defendant did make promise to save the Plaintiff harmless from the Obligation, & that he had not done it. The question hereupon was, whether the verdict had found the same promise set forth in the Declaration because that was to save harmless upon request; but the promise in the verdict mentions no request to be made, but finds a promise generally to save one harmless. The Court held that the Plaintiff ought to have Judgment, for that it was the same promise found in the verdict, which was set forth in the Declaration, for if one promise to save one harmless from a thing, he that made the promise ought to do it at his perill without request, and the request is not material although the promise say upon request; But if he be damnified if I do recompence him upon request made, the Covenant is not broken. A special verdict in an action upon the Case upon a promise. Verdict. Request. Covenant.

Emerson against Ridley.

Mich. 24 Car. Banc. Reg.

Pasc. 24 Car. rot. 400.

RIdley brought an Action of Debt upon an Obligation against Emerson; The Condition of the Obligation was, that the Defendant should not Error upon a Iudgement in Debt upon an Obligation.

put his Cattel upon such a Common before a tryal and proof, for the Common should be for the Commoners, and assigns a breach, that he did put on his Cattel upon the Common before the Tryal for the Commoners; upon this an Issue was joyned, and a verdict, and a Judgement for the Plaintiff. The Defendant brings a Writ of Error, and assigns for Error, that the breach of the Condition assigned doth not agree with the Condition of the Obligation, and so the action being brought upon the Obligation, and no breach of the Condition being rightly assigned, there appears no cause of Action, and so the Judgement is erroneous. But it was said by the Council with the Defendant, that tryal and proof of a matter in common intendment is all one, and so the difference alleged was only verbal and not real, and it shall be taken to be a breach of the Condition, and so there is good cause of Action, and the Judgement thereupon given is well enough. Holhead on Council on the other side denyed it to be all one in sense, for that a Tryal may be, and yet the Title may not not proved, and there may be a Judgement upon a Nihil dicit, where is nothing proved, and so concluded the Writ of Error did lye. The Court desired to have Books, Postea.

Intendment.

Jones against Iacob.

24 Car. Banc. Reg.

Judgement in an action upon the Case.

Jones a Citizen and Pewterer of London, brought an Action upon the Case against Iacob for these words spoken of him, He is gone, and doth hide himself for debt, and for ought I know he is a Banckrupt. The Plaintiff had a verdict, and upon the Defendants motion the Judgement was former y staped. The Plaintiff moves for Judgement notwithstanding: for that the words are actionable. The Court said the words are scandalous, and by them he is disgraced in his Trade. Hales of Council with the Defendant said, that there were other words in the Declaration which are not actionable, and yet dammages are given for both, which ought not to be, and therefore no Judgement could be given. The words said not to be actionable were these, Have a care, and do not trust him, for he will run away and pay you nothing. But the Court held, that both the words taken together are actionable, and ruled the Plaintiff to have his Judgement for both the words, if better matter be not shewed.

Dammages.

Nelson against Tompson.

Mich. 24 Car. Banc. Reg.

Trin. 24 Car. rot. 343.

Demurrer to a replication in Debt upon an Obligation.

Nelson brought an Action of Debt against Tompson upon an Obligation with a Condition to save the Plaintiff harmless. The Defendant pleaded non damnificatus. The Plaintiff replyed and shewed a breach on the Defendants part, whereby he was damnified. The Defendant demurs to the replication, and for cause shews, that the breach was assigned to be at Westminster, and doth not shew in what County Westminster is. The Court held, that though Westminster be a City, yet it ought to be shewed in what County it lyes, because it is not a County of it self. Therefore advise what you will do, for the Action is fit to be discontinued.

Place.

Discontinuance.

Thyn

Thyn againſt Thyn.

Mich. 24 Car. Banc. Reg.

LAtch moved again in this caſe, that the Summons doth not appear upon the retorn to be well made: for it is not ſaid to be made at the Church-doore, as the Statute directs. To this nothing was anſwered. But Bacon Iuſtice ſaid, the retorn was naught for another reaſon, and ſo there is no Record before us to proceed upon; in the Writ of Error the fault is this, The Cuſtos brevium ought to make the retorn here, and it is mentioned to be made per unum deputatorum ſuorum; whereas his Deputy had no authority to do it. Therefore you had beſt to take a new Writ of Certiorari, and certifie the ſame matter by it, and this the Court may grant though it be very rare: for if one will aſsign an Error in a Record and pray a Certificate, and nothing be done upon it, we cannot proceed. Conſider which way you can help this fault.

Whether Summons well retorned.

Retorn.

Tracye againſt Poole

Mich. 24 Car. Banc. Reg.

TRacye brought an Action upon the Caſe againſt Poole upon a promiſe, and declares, that Poole the Defendant in conſideration of a mariage to be had between the Plaintiffs ſon, and the Defendants daughter, & of ſetling ſo much Land upon him upon the mariage, he did aſſume and promiſe that within ſuch a time after the mariage had, he and his Son ſhould be bound per ſcriptum ſuum debita juris forma fiend. unto the Plaintif, for the payment for 3000l. for a mariage portion, & aſsigns the breach that the Defendant & his ſon did not become bound per ſcriptum ſuum Obligatorium: for the payment of the 3000 l. and for this he brings his Action. The Plaintiff had a verdict. The Defendant in areſt of Judgment moves that the breach was not well aſsigned: for the Aſſumpſit was, that the Defendant and his Son ſhould be bound per ſcriptum ſuum debita juris forma fiend. and the breach is, that they did not give ſecurity per ſcriptum ſuum Obligatorium, which agrees not with the Aſſumpſit: for the Defendant might give ſecurity by a Judgement, which is not ſcriptum ſuum; yet it is debita forma juris factum, upon this the Judgement was for that time ſtayed, though then Bacon Iuſtice enclined, that the breach was well aſsigned, becauſe in common conſtruction it ſhall be intended, that the Defendant aſſumed to give his own and his ſons bond for ſecurity. Hales of Counſel with the Plaintiff at another day moved for Judgement, and held, that the breach was well aſsigned, for that it expreſſeth the ſubſtance of the promiſe, though not the very words of it, and this was held good, 7 Car. in Michill and Cars caſe. 2ly. If the meaning of the promiſe be conſidered, it will appear that the Defendant and his Son were to be bound by Obligation 6 Car. Courtny and Gavills Caſe, and indeed the promiſe cannot be ſatisfied by any other way than by an Obligation, for a Judgment or a Statute will not do it; for by them he is not ſaid to be bound; and though all this be admitted againſt me, yet it is now after a verdict, and the Jury have found the breach Maynard for the Defendant argued, that the breach was not well aſsigned: for the breach aſsigned tends to a perſonal engagement for paying the 3000 l. which is not ſo expreſſed in the promiſe, but only a general ſecurity to be given for the monies, and a recogniſance, and a judgement are not properly ſcriptum, as in 9 Car. Goldſmith and Sydners Caſe, and the Declaration doth not ſet forth

Arreſt of Iudgement in an action on the Caſe upon a promiſe.

Breach.

the

the death of Sir Henry Poole by whom the security was to be given, and so it cannot appear whether he had a convenient time to do it as he ought to have, and he held, that the Plaintiff was bound to do the first act, viz. to tender the Obligation to the Defendant, or else he is not bound to seal, and deliver any, and also he ought to make a particular request to him to seal and deliver it. Hales replyed if a man plead a Statute, it is true, that he ought to say per scriptum suum, but pleading ought to be more nice than common parlance. 2ly. The living of Sir Henry Poole is expressed, and there appears time convenient between the promise and the time of his death for performing of it. 3ly. It is not necessary for us to tender a bond, but the other ought to have done it at his own perill, for it is to be done at his charge and not at ours. Roll Chief Justice held, that Judgement ought to be given for the Plaintiff, and said, that for the laying of the promise it is not necessary to pursue the very words of the promise, but the substance, so that there may appear to the Court, that there is cause of Action. 2ly. He held that there is no variance in the substance: for the intent of the parties is to be considered, which was, to have another act done by Sir Henry Poole and his Son, per aliquod scriptum, and not by a verbal promise, and we are to consider if the breach assigned agree to this, and he held, that the promise will extend to a Judgement, or a recognisance: for a Judgement, Statute, or Recognisance is scriptum, and for the time, the Defendant ought to have alleged, that he had not convenient time, if the truth were so: but here doth appear convenient time, and it is not necessary for the Plaintiff to tender the Obligation: but the Defendant ought to do it at his own perill, and to pay the mony in convenient time after the mariage, and the other is not bound to demand it, nor to be at the charge to make the Obligation. Bacon Justice to the same effect, and said, the words ought to be intended of a writting obligatory, according to common intendment, and the meaning of the parties; although it be not so expressed, and it cannot be meant of a promise by parol, for there are no presidents in Law for verbal securities, but only for securities in writting, and the word in debita juris forma implies so much, otherwise here would be only one promise to make good another promise, Pasc. 9 Iac. rot. 361. Banc. Reg. & 21 Iac. upon a Writ of Error in the Exchequer-Chamber, the former Judgement was affirmed, and the breach here assigned meets with the Assumpsit, for it is that he did not become bound per, &c. and so the breach is well assigned. 2ly. Here appears in the Declaration to be two Months for the performing the promise, which is a convenient time, and there doth not appear any hinderance, and the Defendant was bound to do it without request, and there is no necessity for the Plaintiff to make an election of the time when he will have it done. The Court bid the Plaintiff take his Iudgement, except better matter were shewed on Monday following.

Request. Pleading. Tender. Intendment. Time.

Mich. 24 Car. Banc. Reg.

To quash an Endictment.

The Court was moved to quash an Endictment of forcible entry. The Exception was, that the forcible entry is said is to be made in messuagium sive tenementum, which is incertain. But Roll Chief Justice doubted, whether the exception was good or not, because it was messuagium sive tenementum, and the word Messuage may be good though Tenementum be not. But it was quashed upon another exception.

The

The King against VVood.

Mich. 24 Car. Banc. Reg.

To quash an Endictment.

THe Court was moved to quash an Endictment taken at a Sessions against one Wood for getting the horse of another man into his possession, by using another mans name, and a false token. The exceptions taken against it were, 1. The Endictment doth not say that it was contra Statutum: But to this the Court answered that it was an offence at the Comon Law, and the Endictment lay at the Common Law, and therefore it need not to be expressed to be contra formam Statuti. 2ly. It doth not shew what the false token was, nor in whose name it was used. But Roll chief Iustice took another exception, viz. that the Endictment was that the Defendant did the fact nuper, and that is so general a word that no answer can be given to it. And for that it was quashed.

Twigg against Roberts.

Mich. 24 Car. Banc. Reg.

Hil. 22 Car. rot. 956.

Error to reverse a Iudgment in Debt against an Executor. Custom. Wager of Law

AN Action of Debt was brought against an Executor in Bristow upon a Custom of concessit solvere by him to pay a Debt due by the Testator upon a simple contract, and a verdict and a Iudgement for the Plaintiff. The Defendant brought a Writ of Error in this Court to reverse the Iudgment, and the Error assigned was, that the custom of bringing an Action of Debt upon a concessit solvere is not a good custom, because it hinders the party to wage his Law, as by the Law he may do. Walker of Counsel with the Defendant in the Writ of Error argued that it was a good custom, because the party is not thereby hindred of a tryal, and there are customs in London which are against the Common Law, as for example for the Recorder to give Iudgement upon an exigent. The Court desired to see the book, and to have presidents brought them: And said, This Custom had been allowed against the party that made the contract; but the doubt is whether it be good against an Executor, for a concessit solvere is without any consideration. And Roll chief Iustice said, that this custom doth break three rules of the Law.

Barker against Denham.

Mich. 24 Car. Banc. Reg.

Trin. 23 Car. rot. 1280.

Special verdict in an Ejectione firmæ.

BArker brought an ejectione firmæ against Denham, and upon not guilty pleaded an issue was joyned, and thereupon a special verdict was found that by the Custom of the manour, whereof the Lands in question were held, a Copyholder might surrender his Copyhold out of Court into the hands of two customary Tenants, to the use of another, and at the next Court the party to whose use the Copyhold was so surrendred used to be admitted, and That there was such a surrender made here, but that the party to whose use the Copyhold was so surrendred died before the next Court, and

so was not admitted. The question was whether he dying before his admittance, shall be said to be a Copyholder by the Custom of the manour or no. Hales Argued, that he is not a Copyholder within the Custom, and then if this Custom hinder not, the Lands shall descend according to the rules of the Common Law, for so is it of all Copyhold Lands if a speciall custom hinder not, and here 1. the words of the Custom are to be considered, and 2ly. how they are to be expounded, and for this he cited 49 E. 3. f. 19. 22 E. 3. 2 E. 4. f. 24. A Custom shall be construed according to the Common apprehension of the lay gens, and a Custom shall be interpreted according to the most effectual operation of the Law, 3 H. 7. 5. Doct. and Stud. 48. 21 H. 7. f. 33. 44 Ass. f. 10. 4 H 8. Dyer 28. A denyal actual by a Copyholder to pay his rent is a forfeiture, not an implicative denyal, lib. intrat. f. 238: And by a surrender of a Copyhold before admittance the surrenderee hath no real possession, and the heir of a Copyholder before his admittance holds by the Copy of his Ancestor, and so he hath title; but the surrenderee can have no title before admittance, and he cited Rawlins and Iones his case, and Spurlins case. A surrender before admittance, is but a a consent of the party to part with the estate, but passeth it not, and after administration it should have no relation to the surrender. Twisden for the Defendant. 1. He agreed that a Copyholder before admittance is not perfect in his Estate; but yet the admittance shall relate to the surrender, and both shall be accounted one entire Act, contrary to other learnings. 2ly. The Son is in by descent, and the descent must be ruled by the custom, and he is now really a Copyholder, and cited Shellyes case, and prayed Judgement for the Defendant. Roll chief Iustice said, This Case differs from surrendring into the hands of Tenants, for it is into the hands of the Steward out of Court, which is good, and the Lords acceptance of his rent is an admission. But Bacon doubted, and therefore the rule was for the Case to be argued again the next Term, and then by reason of sickness I was absent. But that Term held not by reason of the Kings death.

Descent.

Custom.

Forfeitur.

Title.

Relation.

Surrend. Admission.

Dunch against Smith.

Mich. 24 Car. Banc. Reg.

Arrest of Iudgement in Debt brought by an Executor.

DUnch brought an Action of Debt as Executor for arrerages of a rent charge due to the Testator against Dunch, an occupyer of the land, out of which the rent was issuing, and hath a verdict. The Defendant moved in arrest of Judgement, and for Cause shewed that the Plaintiff doth not shew any title that the Defendant hath in the Land; but only sayes generally that he entred into the Lands, and so it appears not that he is to pay the rent. To this the Counsel on the other side answered, that the Plaintiff being but an Executor cannot know the title, and therefore is not bound to shew it. Roll chief Iustice said, there can be no Judgement, for the Declaration is too generall. But Bacon Iustice held the Declaration good enough. Antea.

Brown

Brown againſt Poyns.

Mich. 24 Car. Banc. Reg.

The Caſe was this, a man made his laſt Will, and made two Executors, the Executors dye in the life of the Teſtator, the Teſtator dyes having two Siſters, the eldeſt Siſter procures Adminiſtration, the younger Siſter moves for a Prohibition to repeal the Adminiſtration, becauſe ſhe being in equal degree of kinn ought to have equall ſhare of the Adminiſtration. But the Court anſwered that a prohibition lies not, for you may appeal if the Adminiſtration be not rightly granted,

For a prohibition to repeal an adminiſtrarion. Prohibition. Appeal.

Mich. 24 Car. Banc. Reg.

A Proceſſe iſſued out of this Court for a Cart and Horſes that were cauſe of a mans death, as a deodand. 12. Iac. and it was moved that there hath been a generall pardon by Parliament ſince that time, by which deodands were pardoned, and therefore it was prayed the proceſſe might be ſtayed. The Court asked whether there be not an exception of deodands for the Almoners intereſt in the pardon: The Councell anſwered there is not: The Court demanded by what words in the pardon are deodands pardoned; The Councel anſwered by the generall words. The Court ordered thereupon it ſhould be ſtayed till the Almoner be heard what he can ſay.

To ſtay proceſſe for a deodand. General pardon.

Mich. 24 Car. Banc. Reg.

The Court was moved for a habeas Corpus for one that was taken in Execution by the Sheriff, and was afterwards ſet at liberty, and after that retaken upon the ſame Execution. The Court anſwered, take it, but you are in the wrong way, for you ought to bring your audita querela.

For a habeas corpus for one taken upon one Executi-on. Audita querela.

The King againſt Bray.

Mich. 24 Car. Banc. Reg.

The Court was moved to quaſh an Endictment of forcible entry made upon a Leſſee for years, upon the Statute of 21 Iac. The exceptions taken to it were, 1. It doth not appear by the Endictment that the Leſſee had any title to the Land at the time of the force committed, for the force is ſuppoſed to be done before the leaſe commenced. 2ly. The leaſe is ſuppoſed to be a leaſe for ſo many years, if I. S. ſhall ſo long live, and it is not averred that I. S. was alive at the time of the forcible entry made. Roll chief Iuſtice cited the Lady Morlyes caſe, that there ought to be a direct allegation of the life. Therefore let it be quaſhed.

To quaſh an Endictment of forcible entry. Averment.

Mich. 24. Car. Banc. Reg.

To quash an Indictment for assaulting a Collector for the poor.

THe Court was moved to quash an Indictment of Assault and Battery of an overseer of the poor villæ de A. in executing of his office: The exceptions taken to it were, 1. That there is no such officer as an overseer of the poor villæ, but it ought to be parochiæ; but the Court said it was well enough, as it was, though it had been more proper the other way. 2ly. The Indictment is for the Assaulting, and beating a Collector for the poor in executing his office, whereas there is no such office appointed for any one particular man by the Law, for the Statute is, that there shall be two Collectors for the poor in every Parish, and so the office is joynt, and not several; But the Court over-ruled this exception also; 3ly. It wants vi et Armis. Upon this exception the Court bid the Counsel move it again.

Gill against Crosse.

Mich. 24 Car. Banc. Reg.

Speciall verdict in Debt against Executors.

THe Plaintiff brought an Action of Debt against two as Administrators, upon fully administred pleaded issue was joyned, and a speciall verdict was found to this effect, viz. that one of the Administrators had fully administred, and that the other Administrator had assets. It was urged against the Verdict that the issue that was found is impertinent and impossible; and so there can be no judgement given upon it. But the Court answered that the verdict is good, yet if Judgement should be given upon it, the Judgement would be ill, and Nevills and Greenwoods case, Hill. 7. Car. in the Exchequer. rot. 1189. was cited, and it was said that Judgement may be against that Executor who hath assets, and nil capiat per billam against the other that hath fully administred. But take Judgement at your peril.

Verdict. Judgement.

Preston against Holmes.

Mich. 24 Car. Banc. Reg.

Trin. or Mich. 24 Car. rot. 2052.

Arguments upon a special verdict upon a Will.

VPon a special verdict found the Case in effect was this, one in see having one Son by one venter, and another Son by a second venter, did by his last Will devise all his Lands to his wife for life, and after her death to I. his eldest Son, and to his Heirs, and the question was whether the Son shall take these Lands by the devise or as Heir at Law, and so the devise to be of no effect to make him come to the Lands by purchase, Christopher Turner held, that the devise is void, because it sayes no more than the Law sayes, for if there had been no such devise, Iohn and his Heirs should have had the Land, and he cited Paramour and Yardlyes Case in the Comentaries, and Hob. rep. 4. Counden and Clarks case. But it is objected, that in this case the Law speaks one thing, and the devise another thing, and so the devise sayes not the same thing. To this I answer, there is no difference concerning

ning the alteration of the Estate, between what the Law directs, and what the devise directs, all the difference is in the manner how his Son John shall come to the Estate, 3 & 4 Phil. & Mar. Dyer, 134. & 37 Eliz. A man seised in fee had issue two Daughters, and devised the Lands to them, and to their Heirs, and it was questioned whether they were Joynt-tenants, and I conceive they are, and where one omits a thing in a conveyance which the Law supplies, this shall not hurt, and he cited Iennings and Pollards Case, 6 Car. Hales on the other side argued, that the Son takes by purchase, and not by descent: for the devise is not to the Son in present, but after the death of the Testators wife, and if he had the Lands by descent, he should have them presently. It is true the Son might have waived the taking by purchase, and might have taken by descent: but here prima facie he shall be intended to be in by purchase, and not descent, for here doth not appear to be any actual waiver of the purchase, and the Son doth here as I conceive, take by way of remainder, and not by way of reversion. And as to the verdict I conceive it is not good, for it doth not shew how the lands are held, whether in Chivalry or Socage, and so it appears not whether the Testator had power to devise all of them or not, for if they be held in Chivalry, he can devise but two parts of them, as the Statute directs. 2ly. It appears not, that the Testator had but one Son by his first wife. 3ly. It is not shewed, that the Lands are parcel of the Manor. 4ly. It doth not appear in whose possession the Lands are. Roll chief Iustice said, Lands that are given by Will shall be intended to be socage tenure, if the contrary do not appear. And he held that the devise is void, and that it is not in the power of Iohn the Son, to make the election to take by descent or by purchase at his pleasure, but he must of necessity take the Land as the Law directs, which is by descent; and it is against a maxim in Law to give a thing to such a person to whom the Law gives it, if it had not been so given, 3 & 4 Phil. & Ma. Dyer, 114. and therefore the Plaintif ought to have Iudgement; And as to the verdict he hath primer possession, and therefore if the other make no title, the verdict is for him, and good enough. Bacon Iustice to the same intent, viz. that the Heir doth here take by descent, and not by purchase, for this the Law says, and he cannot alter it, and cited Foscues Case, 4 Car. and a Case in 7 Iac. And so judgement was given for the Plaintif.

Waiver.

Intention.

Maxim.

Verdict.

Franck against Burt and others,

Mich. 24 Car. Banc. Reg.

The Plaintif brought an Action of Trespass for breaking of his House, and carrying away his Goods, at the Tryal the Plaintif was non-suite. The Plaintif moved, that there was error in the Declaration, and therefore there could have been no Iudgement, and prays that he may be spared costs. Roll chief Iustice answered, that heretofore it hath been made a question, whether the Plaintif being non-suite, should pay costs, but since the Statute of 4 Iac. it is clear, he ought to pay costs for the vexation of the Defendant, and so it hath been ruled here, and you are out of Court now by being non-suite, and therefore you must pay costs; And therefore except better matter be shewed, let them be paid.

For costs for the Defendant upon non-suite of the Plaintif.

Costs.

Mich. 24 Car. Banc. Reg.

For a prohibition to the great Sessions at Carnarvan in Wales.

THe Court was moved for a Prohibition to the great Sessions of Carnarvan in Wales to stop a sute in an English Bill of Equity exhibited there, whereas by the Bill it appears there is no matter of Equity in the Case, but only matter tryable at the Law. The Court answered, if they proceed there against Equity, we cannot hinder them. There was wont to be an Agent here from the Commissioners there for us to confer with in such cases as these, but it seems there is not any here now. Therefore give notice, and let them shew cause the next Term, why a Prohibition should not be granted.

Prohibition.

Mich. 24 Car. Banc. Reg.

How a Habeas corpus to an inferiour Court should be returned.

Return.

VPon reading of a return made by the Sheriffs of the City of Norwitch upon a Habeas corpus directed unto them for one Chambers, It was said by the Court, that it hath been ruled, That upon a Habeas Corpus to an inferiour Court to remove Corpus cum causa, they ought to return all the causes that are depending there concerning the party that hath the Habeas Corpus, if any of the causes depending be for above five pound of which they ought not to hold Plea, and therefore because all the causes were not returned here upon the return of this Habeas Corpus, The Court held, the return was not good, and ordered that it should be amended upon pain of ten pounds by Monday next.

Raph against Davye.

Mich. 24 Car. Banc. Reg.

Arrest of judgement in an action for words.

Averment.

RAph brought an Action of the Case against Davy for speaking these words of her to the Plaintiffs mother, viz. Your Daughter, innuendo the Plaintiff, is a brazen faced Whore, and deserves to be hanged, and for speaking these other words to the Plaintiff herself, viz. you Huswife are a Thief, and have stollen my Purse. The Plaintiff had a verdict; The Defendant moved in arrest of Judgement, that the Plaintiff doth not aver, that her Mother had not any other Daughter besides herself, and so it is uncertain, whether the words were spoken of her or no. But the Court held, it was well enough without such averment, because the Declaration is, that the Defendant habens colloquium of the Plaintiff did speak the words, and that makes it certain enough; And therefore bid the Plaintif take her Iudgement.

Jennings against Lee.

Mich. 24 Car. Banc. Reg.

Cro. 1. Rep. 341. Burton vs Chapman.

Arrest of Iudgement in an action of assault and battery.

IEnnings brought an Action of Assault and Battery against Lee. The Defendant pleads a special plea, and justifies. The Plaintif replies de injuria sua propria, and upon this an Issue is joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgement, that the replication was not good, because it answers not the special matter pleaded, nor takes

takes any traverse by an absque tali causa as it ought to do, and so there is no issue joyned, and consequently there can be no Judgement. Roll chief Justice said, that the replying de injuria sua propria, and not traversing absque tali causa is not good, for there is not an affirmative and a negative, and so there is no issue joyned, and therefore there can be no Judgement; and it is a direct Jeofail, and it is not helped by the Verdict, for it is no tryal, and not a mistryal which a verdict may help. If there be two or three things in a Declaration upon which an issue may be joyned, if an issue be joyned upon any of them it is well, but here is no issue joyned at all: for the replication doth no more but affirm the wrong done, as the Count did. Therefore consider how you can help it. Postea. *190. 210.*

Traverse. Issue. Jeofails.

Mich. 24 Car. Banc. Reg.

Upon the reading of a return of a Writ of privilege granted for one to be restored to the place of an Alderman of the Town of Stafford, Hales took these exceptions to the return, 1. that one cause shewed for the disfranchising the party was, that he had done contrary to his oath, which he said was no sufficient cause for the dis-franchising of the party, for their Letters patents do not warrant it. A second cause returned is, for that he did not make an accompt of such monies, as he had received for the use of the City, and this concerns not the party as an Alderman, and therefore his misdemeanour in that office can be no cause to put him from his place of Alderman. 3ly. It is returned for cause that he did mis-behave himself in his place whilst he was Major of the City, and this as the former is no cause to put him from his Aldermans place. A fourth cause returned is, for speaking contemptuous words against the Major and Aldermen, viz. Knock your heads together till I come, which words cannot be so contemptuous as to be put out of his place for them, for they are not so much as actionable. 5ly. He held, that if any of these causes singly, or all of them together were sufficient to dis-franchise him, yet they have not shewed that they have lawfully removed him, for it appears not that he was summoned to answer any of the things objected against him, neither doth it appear, that he was dis-franchised by those that ought to have done it. The return was ordered to be filed, and time given to answer these exceptions till the next Term.

Exceptions to a Return of a Writ of Privilege. Disfranchisement. Return.

Mich. 24 Car. Banc. Reg.

Upon an Affidavit read, that the cause was removed hither by the Plaintif, The Defendant moves for a Procedendo, that the Court may proceed where the Plaintif first brought his Action. But the Court answered, that the Plaintif may remove his cause hither by Certiorari, and upon the return of the Certiorari the Defendant ought to tender bayl, and if the Plaintif will not accept of it a Procedendo may be granted.

For a Procedendo.

Wood

Wood against Clement.

Mich. 24 Car. Banc. Reg.

Arguments of Counsel, and the Judges opinions touching an Award.

THe Case of VVood and Clement formerly spoken unto, was again moved and spoken to, first by Twisden, who argued, that the Award set forth is void for two reasons. 1. Because it is not final, for it awards one to pay mony to I. S. to the use of another, without his consent, and this cannot determine the matter in controversie, but doth beget suites. 2ly. It is against reason, that the mony due to the Mariners should be payd to any, but the Mariners themselves, and this is not submitted, and if it were, yet it is ill, for the Mariners include not the Master. Maynard held, that the Award was void to this clause, and so there is no breach assigned, and consequently there can be no Judgement given, although some other part of the Award be good, and here is nothing awarded concerning John Acland, who is one of the parties that submitted to the Arbitration, and so as to the mony he hath no satisfaction by the Award, 2 Rich. 3. f. 16. Hill moved, that the Arbitrators have made an Award touching a thing not submitted: for the differences submitted are touching the Ship called the Salvadore, and they have made an Award touching the Ship, and the proceed thereof. Hales on the other side held, that John Acland is not party to the submission no more than the Mariners, and that the other parties have submitted by him. 2ly. He said there is something awarded for John Ackland, for he is comprised within the Mariners, and so he hath satisfaction, and if he be not included, then it appears not that there is any difference touching him to be arbitrated, and here is a joynt trust for all, and one may take upon him for all, and make a discharge for all. Roll chief Justice said, the Mariners, and owners of the Ship are all parties to the submission; but the Plaintif and Defendant in this action are only bound to perform the Award, for they only entred into bond to do it. And the Master of the Ship is the chief Mariner, and he comes in in this notion and so the Award concerns him, 7 E. 4. f. 14. And if the party have power by the Award either in Law or Equity to compell the other to perform it, the Award is good though the party be put to his Action to get it performed. Bacon Justice agreed with Roll, and held Judgement ought to be given for the Plaintif, for that all the parties are included within the submission, although but some of them only are bound to perform the Award, and he said that the Master of the Ship is a Mariner. Ierman Justice said, he would advise, because it was a great cause, but he enclined that judgement was to be given for the Plaintif, because the Award seemed upon the pleading to be good. Brown Justice was of the same opinion, and said, that the Master was a Mariner, and that there is a trust between all the parties, and a good remedy for them all by the Award. Whereupon the rule was, that the Plaintif should have Judgement except better matter were shewn Monday next.

Award.

Mich. 24 Car. Banc. Reg.

Arrest of Judgement in an action upon the Case upon a promise.

THe Plaintif brought an Action upon the Case upon a promise; The Defendant pleaded non Assumpsit, and thereupon an issue was joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgment, and took exception to the setting forth of the promise, which was this, that the Defendant upon a consideration moving from the Plaintif,

did

did assume and promise unto the Plaintif to pay a certain sum of mony; cuidam Fountain, and leaves out his name of baptism, and so it is incertain who the mony should be paid unto, or whether it be now paid or no, and consequently whether there be any cause of Action, and so there can be no Judgement. But Roll cheif Iustice answered, the Assumpsit was grounded upon a consideration past, and peradventure the Plaintif may not know the parties Christian-name to whom the mony is to be paid, though both the Plaintif and Defendant know the person of the man well enough. Therefore let the Plaintif have his Judgement. Assumpsit.

Frank against Dixon.

Mich. 24 Car. Banc. Reg.

FRank brought an Action of Trespass against Dixon for entring into his House, and breaking open his Chest, and taking away his Goods. The Defendant pleaded a special Plea, viz. that he did it by way of a distress for rent due unto him; The Plaintif replyed de injuria sua propria absque tali causa; upon this an Issue was joyned, and a verdict found for the Plaintif. It was moved ut amicus Curiæ that no Judgement could be here given for Costs for the Plaintif, because the Plaintif had made no title to the Goods, and these Cases were cited, 44 Eliz. Trin. 7 Iac. Frith and Blackmans Case, and 5 Car. Davis and Evans. But Roll chief Iustice answered, that he wondered why any body should so move, for it is against the known practice of the Court, and said that he must pay Costs, otherwise there shall be vexation without amends. Therefore let the Plaintif take his judgement. Arrest of Iudgement in an action of Tresp. Costs.

Tyson.

Mich. 24 Car. Banc. Reg.

A Writ of Error was brought to reverse a Judgement given in an Action of Trespas, and exception was taken to the Writ of Error, in that it was not brought by the same person against whom the judgement was given: for the judgement was given against Evison, with the addition of Gentleman, and the Writ of Error is brought by Ivison Yeoman. Roll chief Iustice answered, that Evison and Ivison sounded but as one and the same name, and for the additions of Yeoman and Gentleman it is not material, though they differ here: but if it were the addition of Knight, or Baroner, there the difference would be something, for that is made part of the name, but the additions of Yeoman or Gentleman are additions ad placitum. Error to reverse a judgement in Tresp. Addition.

Cutsworth.

Mich. 24 Car. Banc. Reg.

THe Plaintif declares against two Defendants, against one of them, for an Assault and Battery, and against the other, for taking away his Goods, and upon not guilty pleaded the Plaintif had a verdict, and a judgement against them both joyntly for dammages, and this was assigned for error to reverse the Judgement. Roll chief Iustice said, the Writ cannot be helped, for the two Defendants cannot be joyned in one Action, because the Tresposses are of several natures, and against several persons, and the Error to reverse a judgement in assault and battery. Joyn in act on.

parties cannot plead to this Declaration. Therefore the Plaintif nil capiat per billam.

Mich. 24 Car. Banc. Reg.

To quash an order of Sessions.

THe Court was moved to quash an order of Sessions made, that one should keep his reputed Child, because he had kept him heretofore, and it doth not shew either that he is his Bastard, or his lawfully begotten Child. The order was quashed, because not made according to the Statute.

Mich. 24 Car. Banc. Reg.

Error to reverse a judgment in Debt.

Return.

A Writ of Error was brought to reverse a judgement given in the Court at Exeter in an Action of Debt for rent. The errors assigned were, 1. That the names of the Jurors were not returned upon the panel. To this Roll chief Iustice answered, it is not necessary to return their names, though it was the old way to do so. A second exception was, that the Writ of Error is not well returned, for it is directed to the Maior and Bailifs of the City of Exeter, and it is returned by the Maior and two of the Baylifs, whereas it should be by all of them. Adjourned to the next Term.

Mich. 24 Car. Banc. Reg.

To quash an order of Iustices of the peace.

A Return of an order of Iustices of peace, for keeping a Bastard-Child, removed hither by a Certiorari was read, and upon the reading the Court was moved to quash the order upon these exceptions. 1. It doth not appear, the order was made by two Iustices of the peace, whereof one was of the quorum. 2ly. It doth not appear that the Iustices did inhabit near the place. 3ly. The order doth not direct how long the party shall keep the Child, as the Statute doth direct it should. The order was quashed upon the last exception.

The King against Humphryes.

Mich. 24 Car. Banc. Reg.

To quash an order of Sessions. Deputation.

THe Court was moved to quash an order of Sessions made at Derby for Parents to relieve their poor Children. The exception taken was that the Statute appoints that the Iustices in the Sessions shall set the rate that is to be paid for their maintenance, and that the Iustices here have not done, but have transferred their authority over to other Iustices to do it, which they cannot do, and so the order made by the other Iustices is not good. The Court said, this is all one as if an Arbitrator should arbitrate another to make the arbitrement, which is not good. Therefore let the order be quashed.

The

The King against Golding.

Mich. 24 Car. Banc. Reg.

THe Defendant shewed for cause why restitution should not be awarded against him upon an Endictment of forcible entry, That he will appear and plead to the Endictment. Roll chief Iustice answered, Then you must go to tryal the next Term, and at your own charges.

Cause why no restitution upon an Endictment of forcible entry.

Mich. 24. Car. Banc. Reg.

VPon view of the Parliament Roll of the Statute of 2 Ed. 6. for payment of tithes, and comparing it with the Declarations in the causes between Bowes and Broadhead, and Burraston and Herbert, it was found that the Statute was rightly recited, notwithstanding what had been objected, and the Journal Book of Parliament produced to the contrary; and thereupon Judgement was given in both cases, and the Court said that they were to be ruled by the Parliament Roll, and not the Journal book. And the same day, in the Case between Bowyer and Tantulpar, for the same reason, the Court ordered the Parliament Roll to be brought in Court the next term, to make it appear whether an adjournment of Parliament was well recited, and would not credit the Iournal book.

Parliament Roll brought in Court to examine a Declaration by. Recital. Parliament Roll. Iournal Book.

Mich. 24 Car. Banc. Reg.

PHillips moved the Court to quash an Endictment, for an Assault and Battery made upon Baron and Feme, and for pulling down of the house of the Baron, and he took these exceptions. 1. That the Endictment did conclude ad damnum ipsorum, whereas it should be ad damnum of the Baron only. But the Court answered, that the Endictment is good, though the words ad damnum ipsorum be left out. A second Exception was, that the Endictment doth not shew the time, and place, when the Assault was committed. 3ly. It is said intulit and expulsit in the singular number, whereas it should be intulerunt and expulserunt in the Plural number, because the Endictment is against divers, and so it is false Latin. 4ly. The Endictment uses the word lignum for the tymber of the house, whereas it should be maremium. Twisden on the other side answered, that the Endictment was good at least to the Assault and Battery, though it fail in the other particulars. The Court ordered the Defendants to plead to it, and would not quash it.

To quash an Endictment for Assault and Battery. Endictment. False Latin.

Mich. 1649. Banc. Sup.

THe Court upon the return of a Sheriff of a rescous made, and read was moved to quash it for these exceptions taken to it. 1. It is said feci warrantum meum Thomæ Tayler, and doth not say that Thomas Tayler was his Bayliff. 2ly. He doth not say for what cause he made his Warrant, and so it appears not whether it was lawfull or not. Vpon these exceptions it was quashed.

To quash a Rescous. Warrant.

Mich. 1649. Banc. sup.

Vaux and Vaux against Steward.

Arrest of Judgement in an action upon an Assumpsit.

Upon a verdict found for two Plaintiffs in an Action upon the Case upon an assumpsit, The Defendant moved in Arrest of Judgement, and for cause shews that the Plaintiffs ought not to have joyned in the Action; but ought to have brought several Actions. The Case was this, the several Cattel of the two Plaintifs were distreyned; The Defendant upon consideration of ten pounds paid unto him by the Plaintifs, did assume and promise unto them to procure the Cattel to be re-delivered unto them, and because they were not re-delivered accordingly they brought their Action joyntly. Roll chief Justice said, the promise here is entire, for the consideration is entire, and so the Action may be joyntly brought. Yet let Judgement stay till the other move. Postea.

Joyn in action.

Promise entire.

Mich. 1649. Banc. sup.

Observations upon a Tryal. Presentation. Licence. Grendons case, 11 Rep. Impropriation. Vicarage.

In a Tryal between Cave and Osby, for not setting forth of Tithes according to the Statute of 2 Ed. 6. These things were delivered by the Court, 1. That the King may present to a living by a Letter, but it is a question whether he can do it by paroll. 2ly. There ought to be the Kings licence to make an appropriation of a Church, and to endow a Vicar. 3ly. The King cannot make such a licence without matter of Record, and it ought to be with a Condition to endow a Vicar, and the endowment of the Vicar may be by a distinct instrument from the appropriation, so that it be made at the same time when the appropriation was.

Mich. 1649. Banc. sup.

Robbery of the servant may be robbery of the Master. Robbery.

In the Case of one Wright, brought upon the Statute of Hue and Cry, Roll chief Justice said, that if a mans Servant be robbed of his Masters Goods in the sight of his Master, this shall be taken for a robbing of the Master. And if one cast away his Goods to save them from a Robber, and the Robber take them up, and carry them away, this is a robbery done to his person.

Coles against Sibsye.

Mich. 1649. Banc. sup.

Trin. 1649. rot. 148.

A Latitat in nature of an original.

Coles brought an Action of Trover and Conversion against Sibsye, The Defendant pleaded the Statute of Limitation of actions in bar of the Action. The Plaintif replies, that he took out a Latitat out of this Court against the Defendant within the time limited by the Statute, which yet continues depending. Roll chief Justice said, a Latitat out of this Court is in the nature of an original in the Common-pleas, and so hath been always held to be. Adjourned.

Original.

Mich.

Mich, 1649. Banc. sup.

The Court was moved to quash divers Endictments against the Inhabitants of the Parishes of Shoreditch and Hackney in Middlesex, for not repairing the High ways. The exception taken was, that the Parishes are joyntly endicted, whereas their offences are several, and also not equal, and yet both fined alike. The Court quashed the Endictment, and discharged the issues which were not returned, but not those that were returned. To quash Endictments of Parishes for not repairing the high way.

Gardner against Jollye.

Mich. 1649. Banc. sup.

Pasc. 1649. rot. 189.

Jollye brought an Action upon the Case against Gardner for causing him to be endicted of Felony as accessary, for suffering a Prisoner to escape that was convicted of Felony. The Plaintiff had a verdict, and a judgement; The Defendant brought a Writ of Error to reverse this judgement, and the error assigned was, that the party was endicted for a matter which is but a Trespass, and not a Felony, and so the Declaration is mistaken, and an Action upon the Case lyes not. But the Court answered, that the charge of the Endictment is for Felony, although the matter the party is charged with be not Felony, and a scandal lay upon him by it, and therefore the Action lies. Error to reverse a judgement in an action on the Case. Case.

Vaux and Vaux against Steward,

Mich. 1649. Banc. sup.

The Case between Vaux and Vaux, and Steward, was again moved in arrest of Judgement. The objection made was, that the promise made amounted to a double promise, and therefore the parties to whom the promise was made ought to have brought several Actions, and not to have joyned in the Action, as they have done. But to this it was answered by the Councel on the Plaintiffs part, that the promise is entire, and is not double: for the consideration of the promise is entire, viz. the ten pound which moved from them joyntly and not severally. Roll chief Justice held, that it is an entire promise, and a joynt consideration, though the Cattel taken were several, and therefore the Action may be joynt, and if one lay out mony for a thing assumed to be done for a third person, if it be not done an Action shall be brought upon the Assumpsit by him who layd out the mony; but because a Case was cited out of Yelvertons Reports to be against the opinion of the Court, therefore the Court ordered the Councel to bring that Case, and in the mean time they would advise. Antea. Arrest of judgement in an action upon an Assumpsit. Joynt promise. Rippon and Mortons case, f. 1.

Mich. 1649. Banc. super.

Christopher against How.

Arrest of Judgement in an Action upon the Case.

CHristopher brought an Action on the Case upon an Assumpsit against How an Executor, and declared upon a promise made by the Testator to the Plaintif, to deliver certain goods in the possession of the Testator unto the Plaintif upon request, and because the Testator had not delivered them accordingly, the Plaintif brings his action. The Plaintif had a verdict: The Defendant moved in arrest of Judgement, and for cause shews, 1. That the breach of this promise was in the Testators life time, and therefore the Action should have bèn brought against him, and is not now to be brought against the Executor. 2ly. The Testator did not promise that his Executors should deliver the goods, but that he would deliver them upon request; and there appears no request to be made to the Testator, as there ought to have been. 15 Iac. Hob. rep. f. 300. Bodwells Case. But Roll chief Iustice answered, That an Executor may be charged upon a collateral promise, if there were a breach of it in the Testators life time, and here is a good request, and goes to all: Therefore let the Plaintif take his judgement, except better matter be shewed to the contrary.

Request.

Executor.

and Osborne.

Mich. 1649. 1 Re'pub. Ang. Banc. super.

Arrest of Judgement in an Action upon the case. Issue.

THe Plaintif brought an Action upon the Case upon two several promises, the Defendant pleaded non assumpsit, and upon this an issue was joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of judgement, and for cause shews, that there is no issue joyned as to the second promise alleged, for he doth not conclude with petit quod inquiratur per patriam, and yet there is a verdict found upon both the promises. The Iudgement was arrested till the other should move.

Mich. 1649. Banc. super.

A Case upon a special verdict argued.

UPon a special Verdict the case was this: Tenant for life, the remainder for life, the remainder in tayl, the remainder to the right heirs of him in the remainder for life; the remainder man in tayl levies a fine in the life of tenant for life; And the question was, whether by the levying of this fine the estate tayl were discontinued or no. To prove that the estate tayl was discontinued, these Books were cited, 1 H 7. 22. Lit. Cap. Discents, Sect. 34. 14 Ed. 3. Fitz. Avowry 117. 3 Ed. 3. Fitz. grants 60. 15 Ed. 4. 9. 2 Rep. Butlers case 65. Cooks Lit. f. 25. Pasch. 13 Car. Hungates Case, Banc. Reg. Dyer. 339. Twisden to the contrary argued, that the estate is not altered, neither to the right nor by way of Estople, 46 Edward 3. f. 23. An Estople supposeth a thing to be done; and therefore if the thing be impossible which is alleged by way of estople, it can be no estople. And one shall not be construed to doe wrong by an Act which may be interpreted so, that by it he may doe no wrong. Brooks Abridgement Grants 49. Roll chief Iustice, The matter here is not how the estates shall pass, and how

Estople.

how to make them good; but the Question is upon the forfeiture: for he levies the fine as of an estate in possession, and not of a reversion in fee; and this is not upon the rule in Bredons case, 13 Car. Sir Julius Cæsars case; an Acceptance of an estate, or an Attornment by Tenant for life to a stranger, is a forfeiture. Jerman Iustice held there was no forfeiture. But the Court said the Verdict was ill found; and therefore ordered it should be amended, that the whole matter in Law might come in question. Forfeiture. Amendment.

Gray against Walye

Mich. 1649. Banc. sup.

WAlye brought an Action upon the Case against Gray, for speaking these words of him, viz. Jack Walye was questioned for stealing of a gray Mare with a snip in her ear, and hue and cry went out after him, and he durst not shew his face hereabouts. The Plaintif had a Verdict; and the Defendant moved in Arrest of Judgement, that the words were not actionable, because they were general and uncertain words, and it doth not appear the party was damnified by them, nor how long ago they were spoken. Roll chief Iustice said, that the party was defamed by speaking of them, and he hath said it that he lost his Credit thereby. Therefore let the Plaintif have his Iudgement, except better matter be shewn. But Nicholas Iustice doubted whether they were actionable or no. And Ask Iustice nihil dixit. Arrest of Judgement in an Action upon the case.

Mich. 1649. Banc. sup.

AN Attorney of this Court that was within age, appeared to an Action propria persona, and pleaded to issue, and had a verdict and a judgment for him: and upon this a writ of Error was brought here, it being an error in fact; because that being within age did not appear per guardianum, nor by his Attorney; and it was said, that it is not helped by the Statute of Jeofails, though it be after verdict. And thereupon the Court stayed the Execution. Error against an Attorney in Court, for appearing *propria persona*, being within age. Error in fact.

Mercer against Rule.

Mich. 1649. Banc. sup.

THe Court was moved, That a writ of Error was brought to reverse a Judgement, and that it was received and allowed: and notwithstanding the Plaintif that had the Judgement had taken out execution, and thereupon it was prayed for a supersedeas to supersede the execution, and for an Attachment against the party for his contempt to the Court. And it was urged by the Counsel that moved, That after a writ of Error is received and allowed, the hands of the Court that gave the Judgement, are foreclosed from granting out execution; and that the writ of Error is in it self a Supersedeas, and cited Dyer 283. and therefore concluded, that the execution is not well issued forth. Twisden of Counsel on the other side said, that the writ of Error was not duly pursued, because the roll was not marked; and therefore the party might well take out execution. But Roll chief Iustice answered, that the writ was well pursued, though the roll were not marked; Yet if neither the roll be marked, nor notice given to the Attorney on the other side of the bringing the writ of Error, if the party proceed to take out execution, it is no contempt to the Court: otherwise it is For a *Supersedeas* & attachment for taking out execution after a writ of Error brought and allowed. *Supersedeas.* Attachment. Execution. Notice.

Contempt. a contempt; And it is the duty of the Clerk of the Errors to mark the roll, and not the Attorneys; and therefore take a Superſedeas, quia improvide emanavit, to ſtop execution.

Superſedeas.

Pym againſt Morgan, alias Bambery and Baſelye.

Mich. 1649. Banc. ſup.

Hill. 24 Car. rot. 1062.

Argument upon a ſpecial verdict in an *Ejectione firmæ.*

IN an Ejectione firmæ brought for the Manor of Caledown, The Defendant pleads Not guilty; and upon this the Jury find a ſpecial verdict to this effect, That Sir Thomas Morgan was ſeiſed in fee, amongſt other lands, of the lands in queſtion, and that in 13 Car. he made a ſettlement of theſe lands to himſelf for life, the remainder to his daughter Mary for life, the remainder to the heirs of the firſt Tenant for life, with a power of revocation, to alter all or any part of the ſettlement made at any time during his life: The verdict finds further, that there was an Ordinance of Parliament made in the year of our Lord, 1645. that Sir Thomas Morgan ſhould forfeit all his lands and eſtate which he was then ſeiſed or poſſeſſed of, or had been ſeiſed or poſſeſſed of from the year 1641. and that by the ſame Ordinance the lands in queſtion were given to Mr. Pym; & that by virtue of the ſaid Ordinance he entred & was ſeiſed pro ut; & that Mr. Pym died ſo ſeiſed, after whoſe death the Plaintiffs leſſor, as his heir, entred, & made a leaſe to the Plaintiff, & after that Sir Tho Morgan died, & Mary the Defendant claiming as tenant in remainder for life after the death of Sir Thomas her father, by vertue of the ſettlement made 13 Carol. entred into the lands in queſtion, and the Plaintiff as leſſee of Pym brings the action. Upon this ſpecial verdict, the Queſtion was, Whether by the Ordinance of Parliament made not till the year 1645. yet looking back to the year 1641. the remainder of the lands in queſtion, which was ſetled 13 Car. being before the making of the Ordinance, and alſo before the time to which the Ordinance looks back, be forfeited by the Ordinance or not? Larch of Counſel with the Defendant argued, That it was not forfeited; 1. Becauſe that the Ordinance is penal, and retroſpective or looking back; and therefore it is odious in Law, and ſhall not be largely interpreted but as ſtrictly as may be. 2ly, The preamble of the Ordinance ſets forth 2. things, as the reaſons why the Ordinance was made; 1. Mr. Pyms deſerts, to whom the lands were given; 2ly, Morgans offences, for which he was thus puniſhed; and both theſe grounds for making the Ordinance can extend no further than to the year 1641. and ſo not to the time of the ſettlement made 13 Car. by Sir Thomas Morgan; for then neither of theſe cauſes alleged were in being; 2ly, The purview of the Ordinance is double; 1. punitive; 2ly, remunerative. 1. the punitive part, which concerns the puniſhing of Sir Thomas Morgan; 2ly, the remunerative part, concerning the rewarding of Mr. Pym; and the punitive part made in the year 1645. cannot reach the eſtate ſetled upon Mary his daughter ſo long before, viz. 13 Car. for it can reach no further back than to the year 1641. at the moſt, to which time, and no further, the Ordinance is retroſpective: and in the Statute of 23 H. 8. general words of an Act are reſtrained. Beſides, there is a demonſtration in the Ordinance, that ſhews the Ordinance doth not extend to the eſtate of the Defendant, as may appear by the proviſoes conteined in it; for although the children of Morgan are to be puniſhed within the Ordinance by the ſecond proviſo of it, yet this extends not to ſo long time as to 13 Car. when the eſtate was ſetled, but only to the eſtate, as it was in the year 1641. And there-

Forfeiture.

fore

fore prayed Judgement for the Defendant. Wadham Windham on the other side argued, that the estate of Morgan, though it was said to be setled 13 Car. was forfeited by the Ordinance. Because the estate was not absolutely setled at that time, for there was a proviso in the conveyance to revoke the settlement, so that at the time of the Ordinance made the estate was in Sir Thomas Morgan absolutely to dispose off as he pleased, and by the words of the Ordinance all Morgans estate is passed without any saving, and the provisoes of the Ordinance do prove, that the Children of Sir Thomas Morgan were excepted out of the savings made to preserve the estates of others. Also Boons and Favours bestowed use to be amply expounded, and this being a Boon bestowed by the Parliament shall receive as large a construction as is possible. Besides Morgan was a Papist, & therfore it may well be supposed, that he intended not this for any real settlement, but only by way of subtility for some private reasons: for we know that Papists do use to make such settlements as this was to preserve them from penalties of the Law. And the words of the Ordinance are accumulative to convey all Morgans estate, and there are no restrictive words, and if there were they should be void here: for the Manor of Callidown being the Lands in question are expresly given by the Ordinance, and as to these Lands the rights of all men are bound, and therefore if there were a saving it would be void, as it is Cook rep. Alton Woods Case. And an act of Parliament sometimes is as a conveyance, sometime as a judgment, and both wales a saving in it is void and frivolous, 1 Rep. 4. A conditional estate or a right may be saved by Judgment or fine, but not an entire estate or interest, and therefore the estate of Mary in the Manor of Callidown, cannot be saved by any proviso, and he cited Alton Woods Case for authority in the principal Case, f. 51. But admitting a general saving had been good to save Maries estate, yet as the words of the Ordinance were penned, her estate is not saved by it, for the words were put in the Ordinance for the advantage of Pym, and not to provide for Mary: for she claims from Thomas Morgan, and so prayed Judgement for the Plaintif. Roll chief Iustice said, that the provisoes in the Ordinance are not void to all persons, as Windham argued, for Strangers are clearly provided for by them. But let the Case be argued again Saturday fortnight, Postea. Saving.

Harwood against Payte.

Mich. 1649 Banc. sup.

Entred Hill. 24 Car. rot. 78.

THe question insisted upon in this Case was, whether upon a recovery in an Action of Debt against a Parson, the Tithes be extendible by Elegit. Hales of Councel with the Plaintif held, that they are, because that Tithes may be said to be Tenements, and the Parson hath a Free-hold in them, although he hold them jure Ecclesiæ. But Roll chief Iustice said, that a Parsonage cannot be extended, but that the Debt may be levyed out of the profits of it by the Sheriff, as it was wont to be done: for now there being no Bishops the profits cannot be sequestred by the Bishop of the Dioces, as they used to be. But Ierman and Nicholas Iustices doubted. Ask Iustice agreed with Roll, and said, that by the Common-law the Clergy are no more privileged from paying their debts, than Lay men are. Roll chief Iustice said, it hath been heretofore questioned, whether a Clergy-man be subject to watch and ward, or to contribute to satisfie for a robbery done within Whether Tithes be extendible upon an Elegit. Elegit. Extent. Sequestration Clergy.

in the Hundred: but now it is no question but they are subject, and shall contribute. Adjourned till Saturday to be argued again. Postea.

Tyndal and others against Harington.

Mich. 1649. Banc. sup.

Arrest of judgement in Debt for arrerages of an annuity. Debt. Annuity.

TYndal brought an Action of Debt against Harington for arrerages of rent due to him as Lessee of a Vicarage, and upon nil debet pleaded, there was an Issue joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgement, that an Action of Debt did not lye, but that he ought to have brought a Writ of Annuity, because it was for arrerages of an Annuity, which yet continues, and 6 H. 4. 7. & 9 H. 6. 94. were cited. The Iudgement was arrested till the Plaintif should move.

Compton against Allen.

Mich 1649. Banc. sup.

Entred Trin. 1649. rot. 348.

Demurrer upon a Plea in an action of Covenant. Covenant.

COmpton brought an Action of Covenant against Allen his Lessee for years upon a Covenant of the Indenture, for not keeping the House let unto him in repair. The Defendant pleads, that the House was burnt by casualty. The Plaintif demurs to this Plea, and for cause shews, that the Plea was contrary to the Defendants express Covenant by his Deed, and therefore was not good. Roll chief Iustice said, that a Lessee that covenanteth to repair, ought to do it if the House be burnt, be it by negligence, or by other means. Therefore let the Plaintif have Iudgement except cause shewed to the contrary.

-- against Phillips.

Mich. 1649. Banc. sup.

Arrest of judgement in an action upon the Case. Escape.

AN Action upon the Case was brought against Phillips for suffering one to escape; The Plaintif had a verdict; The Defendant moved in arrest of Judgement, and for cause shews, that the Declaration was insufficient. For 1. it shews, that the party was arrested that made the escape, but it doth not shew by what process he was arrested. 2ly. The Declaration saith, that he was arrested virtute Querelæ, which cannot be: for he is arrested by virtue of the Writ, and not of the Plaint. 3ly. The Declaration doth not shew by what authority the Prison was kept, out of which the escape was made. Roll chief Iustice said, that the second exception was material, and then if the party be not well arrested, there can be no escape, and so the Action lyes not. Therefore nil capiat per billam, if cause be not shewed to the contrary.

Escape.

Iohnson

Iohnſon againſt Abington.

Mich. 1649. Banc. ſup.

IOhnſon brought an Action of the Caſe againſt Abington, and declared, that the Defendant in conſideration that the Plaintif would deliver unto the Defendants Son ſuch wares as his Son ſhould deſire, did aſſume and promiſe unto the Plaintif that he would pay the Plaintif for them, and avers that he had delivered certain wares unto his Son, and that the Defendant did refuſe to pay for them, and for this he brought his Action. The Defendant pleads non Aſſumpſit, and upon this an Iſſue is joyned, and a verdict found for the Plaintif. The Defendant moved in arreſt of judgement, and for cauſe ſhews, that it doth not appear, that the Son of the Defendant did deſire the Goods that the Plaintif delivered unto him, and for which he brings his Action, and the Aſſumpſit being to pay for ſuch as his Son ſhould deſire, the Declaration ought to ſet forth an actual deſire of the Son, to have the wares delivered. But Twiſden of Councel with the Plaintif anſwered, that the delivery of the commodities by the Plaintif, and the acceptance of them by the Defendant implyed a deſire, and it is not neceſſary to ſhew an actual deſire. Ierman Iuſtice ſaid, there ought at leaſt to be a verbal deſire. But Roll chief Iuſtice ſaid, that the acceptance of the wares is an actual deſire, and that is more than a verbal deſire, and it is not neceſſary here to affirm the punctual words of the promiſe: but only the ſubſtance of it. And therefore let the Plaintif have his Iudgement, if better matter be not ſhewed.

Arreſt of judgement in an action upon an Aſſumpſit.

Averment

Declaration. Aſſumpſit.

Mich. 1649. Banc. ſup.

WAlker moved to quaſh an endictment againſt the Inhabitants of Mile-end, within the Pariſh of Stebenhoth for not repairing the high way, and to take off the iſſues upon a Certificate read, that the way was repaired, and upon this exception taken to the Endictment, viz. that the Inhabitants of Mile-end within the Pariſh of Stebenhoth are endicted, and Mile-end is but a Hamlet within a Pariſh, and a Hamlet within a Pariſh cannot be charged to repair a high way, except it be by preſcription, or for ſome other ſpecial reaſon: for of common right the whole Pariſh is charged with it; and here is no ſuch preſcription or particular reaſon ſhewed in the Endictment, and therefore it is not good. Roll chief Iuſtice anſwered, that of common right a Hamlet is not ſo charged, but a Vill is; and therefore let it be quaſhed, but the iſſues ſhall ſtand: for few will repair the high way till they be forced.

To quaſh an Endictment.

Common right.

High way.

Fines againſt Dell.

Mich. 1649. Banc. ſup.

FIines brought an Action of Debt upon an Obligation to perform certain Covenants contained in an Indenture. The Defendant pleads performance generally; The Plaintiff demurs to the plea, and for cauſe ſhews, that divers Covenants are compriſed in the Indenture, and that ſome of them are in the Affirmative; and others of them are in the Negative, and therefore a general pleading of performance to all is not ſufficient: for as to the Covenants in the Affirmative he ought to plead a ſpecial performance, and to ſhew how he hath performed them. The Court bid the Plaintif take his judgement, except cauſe be ſhewed to the contrary.

Demurrer to a Plea in Debt upon an Obligation to perform Covenants. Plea.

Mich 1649. Banc. sup.

For a rule to acknowledge satisfaction.

The Court was moved that there might be a rule of Court for the party upon satisfaction made of a judgement obtained by him, to acknowledge satisfaction. But the Court denyed it, and said there was some trick in the businesse; For no doubt but the party upon receipt of what is due to him will acknowlege satisfaction without a rule to compel him.

Crible against Orchard.

Mich. 1649. Banc. sup.

Entred Trin. 1649. rot. 730.

Error upon a judgement in debt upon an Obligation.

Orchard brought an action of debt against Crible upon an Obligation, the Defendant pleaded per minas; upon this an issue was joyned, and a Verdict and a Judgement given in the Court at Barnstaple for the Plaintif, and upon a Writ of Error brought three Errors were assigned: 1. That the Declaration was insufficient. 2ly. The Common Error. 3ly. That the Venire was not good; but these were over-ruled. And Roll chief Iustice upon Dyer of the Record found this Error, That the Jury in the assessing of damages say pro missis & Custagiis, &c. but doe not not say circa sectam et expenditis, and so it cannot appear for what the costs and damages are assessed, and said, It is true that the judgement is right entred; but there is no Verdict to warrant the Judgement, and therefore it cannot be good, and therefore let it be reversed if cause be not shewn to the contrary. But we will not pronounce it now except the party desire it for his own expedition.

Damages. Iudgement.

Ayre against Pyncomb,

Mich. 1649. Banc. sup.

Arrest of Iudgement in an Action upon the case for surcharging a Common. Assize. Trespass upon the case.

Ayre brought an Action upon the Case against Pymcomb for surcharging of a Common, and for treading the Grass: The Plaintif had a Verdict: The Defendant moved in Arrest of Judgement, That an Action of the Case doth not lie in this case, but an Assize. 2ly. That an Action of Trespass doth not lie for a Commoner for treading of the Grass. 3ly. The Trespass is alleged to be done in quibusdam peciis pasturæ, and the quantity of them is not shewed. To the first Exception Roll chief Iustice answered, That the Plaintif may have an Assize or an Action upon the Case at his election, although here be a disturbance of the Plaintifs freehold, although that the antient books say the contrary: And thereupon the Court gave Iudgement for the Plaintif, except cause shewn to the contrary.

Brook against Hogg.

Mich. 1649. Banc. sup.

Hill. 24 Car. rot. 660.

Iudgement in an accompt reversed for Error in it.

A Judgement given in an Action of Debt upon an account in the Court of Knaresborough was reversed here, because the Venire facias was

Veni-

Veuire facias, &c. which in an Inferiour Court is not good, but it ought to say Venire facias duodecem probos et legales homines de, &c. & so express all at large in words, and not with an, &c. Note, Many Iudgements given in Inferiour Courts have been here reversed upon the same exception: But I only mention this for an authority to be cited upon occasion. Venire.

Ibson against Beale.

Mich. 1649. Banc. sup.

Hill. 24 Car. rot. 625.

IBson brought a Writ of Error to reverse a Iudgement given against him for Beale in the Court at York, in an Action of Debt upon an Obligation, and assigned for Errors. 1. That the party hath not entituled himself to the Action. 2ly. The issue is not well joyned; for the Plaintif saith, ideo ponit se super patriam, where he ought to say, petit quod inquiratur per patriam. 3ly. He concludes, to his damage of l. l. (i.) fifty pounds expressed in numerical Letters, viz. L. for fifty, and L. for pounds, instead of quinquaginti librarum. The Iudgement was reversed upon the last Exception. Error to reverse a Iudgement in debt. Issue. Damage.

Stubs and *Manklyn*

Mich. 1649. Banc. sup.

A Writ of Error was brought to reverse a Iudgement given in the Court at Owse-bridge in York, in an Action of Debt upon an Obligation, and the Common Error only assigned. But Roll chief Iustice upon Dyer of the Record took this exception, That the Record was ideo præceptum est Vicecomiti, and it is not said in Curia, and so it doth not appear to be the Process of the Court; And for this Error the Iudgement was reversed. Error to reverse a Iudgement in debt. Venire.

Topladye against Stalye.

Mich. 2649 Banc. sup.

Mich. 24 Car. rot. 596.

TOpladye brought an Action of Trespass quare clausum fregit & pedibus ambulando &c. against Stalye: The Defendant makes a special justification, That he did enter into the Plaintifs Close to search for Sheep that were stollen from him. To this Plea the Plaintif demurr'd, and for cause shews that the justification is not good, for it is not said by the Defendant that the Plaintif had stollen the Sheep, or that he had any suspition that he had stollen them, or that any other had stollen them & driven them upon the Plaintifs land, and so had no colour to come there to search for them, and the Books of 17 E. 4. f. 1. and 27 H. 8. 23. & 6 E. 4. 7. & 21 H. 7. f. 10. & 22 H. 8. f. 36. & 28 E. 3. f. 10. were cited. Another exception was also taken, That the Defendant doth not say that the Gate of the Close where he entred was open; and though he may justifie to search for his Sheep in the Close, yet he cannot justifie the breaking of his Close to doe it. But Demurrer and argument upon a plea in Trespass. Iustification.

Roll chief Iustice over-ruled this exception: And for the matter in Law, whether the Defendant had made a good Iustification or no. He held that he had not, for all that he hath alleged by way of Iustification is but matter of private profit to himself, and not for the publique good; for he went not thither to find or apprehend the Felon, but to look for his Sheep; And if Cattel be stollen and put into my ground, I may take them damage feasant, or bring an Action of Trespass against the owner, and the owner cannot take them away without the license of the possessor of the ground, for if he might, by that means the possessor of the ground would be without remedy for the damage the Cattel had done him: And he said, That when one hath suspition of another for felony, he ought to shew the cause of his suspition, otherwise the party suspected ought not to be arrested upon it; and concluded that the Plaintif ought to have Judgement. Jerman Justice held, that the Defendant ought to have Judgement, because a private injury as this Trespass is, ought to give way to the publique good, viz. the discovery of Felony; and here is a publique good intended, and it ought to take place of the Plaintifs inconsiderable injury. And he said that one may be arrested for Felony only upon Common fame, if there be a felony committed: Otherwise it is if there be no Felony done. Ask Justice said the Case was hard on both sides. But the Court gave Iudgement for the Plaintif except cause should be shewn to the contrary.

Distress. Damage feasant. Licence. Arrest.

Mich. 1649. Banc. sup.

To quash a Return of a Rescous.

WIld moved the Court that the return of a Habeas Corpus granted for certain rioters called the Diggers that were committed by Justices of Peace upon finding the Riot upon their view might be filed, which was granted, upon which he moved that the prisoners might be discharged, but the Court commanded the return to be read, upon the reading of it Wild took this exception, viz. That the prisoners were committed contrary to the Statute of H. 4. c. 7. for by that Statute the Sheriff ought to be present at the finding of the Riot, which was not so here. Walker held that the Justices had power by the Statute without the Sheriff to enquire of the Riot, and to commit the Rioters. But Roll chief Iustice said, that there is no enquiry made in this case, for the Riot is found upon the view, and so there needs no enquiry, and the Record ought to be made up by the two Justices that had the view, and by the Sheriff, and it is not made by them as Justices, but as Judges joyned with the Sheriff by the Statute, & Justices that find a Riot may either bring in the Record in Court propriis manibus of their own accord, or may send it into Court, as they have done here. The prisoners committed upon the first Record read (for there were two here read in Court) were bailed but not discharged, although the return was not good, because the Court said it was not usual to discharge prisoners at the first reading of the return; For the other prisoners, The Court advised.

View. Record. Discharge.

Bendir against Oyle.

Mich. 1649. Banc. sup.

For a Prohibition to the Court of Policy of assurance.

A Prohibition was prayed to the Court of the Commissioners of policy for assurance upon a surmise that they proceeded there in the tryal of

of the Assurance of a mans life, which was said to be tryable at the Common law, as it was before the Statute made that erected that Court, as may appear by the preamble of the Statute. Roll chief Iustice said, that the Assurance of the life of a man is not within the Statute of Assurance, as the Assurance of a mans life upon the buying of an office; but this case is different, for the man whose life is here assured is going to sea upon Merchants affairs, and his life may be as well assured, as the safe return of the ship he goes in. But let Councel be heard on both sides Wednesday next; but wee will stay nothing in the interim. Postea. Assurance.

Mich. 1649. Banc. super.

AN Information was exhibited against the Inhabitants of the Town of Burmingham, for not repairing Burmingham-bridge; two of the Defendants plead to issue, and a verdict was found for them in pais. It was moved for the Defendants, that Mr. Attorney General had mistaken the Christian name of one of the Defendants in his replication; and prayed that the Record might be amended before Iudgement entred, that the Iudgement may not be erroneous by reason of this mistake. The Court answered, Bring a Copy of the Record to us to advise upon; but they said they did not see how it could be amended, for that they conceived there was no issue joyned. To amend a Record after verdict. Amendment. Issue.

Hobbs against Blanchard.

Mich. 1649. Banc. sup.

Pasch. 20 Car. rot. 220.

BLanchard brought an action of Trespas in the Court at Norwitch against Hobbs, and had a verdict and a Iudgement. The Defendant brought a writ of Error to reverse the Iudgement. The error assigned was, that the Iury had not found the issue joyned; for the issue joyned is, de injuria sua propria absque tali causa, and the Iury have found not guilty generally. Panel of Councel with the Defendant in the writ of Error said, that the Iury have found the effect of the issue, though they have not found the very words, and therefore it is good enough, and he cited Fabian & Kingstons case, 32 Eliz. and Wingrave & Homes his case 3 Car. entred 2 Car. rot. 632. Roll chief Iustice answered, That the verdict found the issue argumentatively only, and not directly; and therefore it is not good. Ierman Iustice was of the same opinion: and the Iudgement was reversed, except better cause shewn. Error to reverse a Iudgement in tresp. Verdict.

Carew against Bawd.

Mich. 1649. Banc. sup.

Trin. 24 Car. rot. 1607.

CArew brought an Action of trespas against Bawd for entring into his ground, and taking away a certain parcel of Tynn. The Defendant pleaded Demurrer to a plea of privilege of Parl. in an action of trespas.

pleaded that he was servant unto the Lord Moone, who was a Lord of the Parliament, and that he took the Tynn by his Command, and claims his privilege as his servant, not to be impleaded: to this plea the Plaintif demurrs, and for cause shews, that the Defendant doth not shew that he was the Lord Moons menial servant, and attending upon his person: and it may be he was his Carter or Plowman, and such servants are not privileged. Roll chief Iustice said, The privilege is not claimed here meerly as his servant; but he justifies here as his servant in defence of his Masters title to the Tynn, which he took by his command. But let the Defendant plead in Chief, and let the Plaintif waive the Demurrer: Or else let the Plaintif enter his suggestion upon the roll, that the House of Lords is now dissolved, and so let them take issue and go to tryal: Or else let the party plead what he will upon record, and we will advise in the mean time.

Privilege.

Waiver.

Paroch. de Hardingham versus Paroch. de Brisley.

Mich. 1649. Banc. sup.

For quashing an Order of Sessions for the setling of a Vagrant.

A Order of Sessions made for the setling of a poor woman in the parish of Hardingham was returned hither by a Certiorari granted to the said parish, and upon the return read, and opening the matter by Councel, the case was this. An inhabitant dwelling within the parish of Brisley, did hire a maid servant for a year, and Covenanted to give her Forty shillings for her wages, and entertained her into his service. The maid servant some time after fell sick in his service; her Master thereupon turns her out of his service, without giving her any thing: the maid, for necessity, in travelling from Brisley toward Hardingham where her friends lived, and where she was born, was forced to beg for relief: whereupon she was sent as a Vagrant to Hardingham, where she was born. The Will of Hardingham send her back to Brisley, where she was entertained as a Covenant servant: whereupon they of Brisley procure an order of Sessions to settle her at Hardingham. The Question was, Whether this were a good order, or not, for setling her at Hardingham according to the Statute? Or, whether she ought to be setled at Brisley, where she was entertained as a Covenant servant and turned out of service, and forced to begg by that means. Roll chief Iustice said, That here seems to be fraudulency in the Master to make his servant a Vagrant, that so he may be rid of her; but if one begg meat and drink, for necessity, in passing between one Town and another, this is not begging to make one a beggar within the Statute. And therefore the Court ordered that the party should be setled at Brisley, where she was entertained for a Covenant servant, and not at Hardingham where she was born, if cause were not shewn to the contrary.

Vagrant.

Setlement.

Harwood against Paty.

Mich. 1649. Banc. sup.

Argument in trespass, whether Tithes be extendible.

THe case betwéen Harwood and Patye was again spoken unto, by Wild of Councel with the Plaintif, wherein the Action being an Action of Trespass for taking away wheat, rye, and wood, upon an Elegit taken out against a Parson, The Question was, Whether Tithes are extendible upon an Elegit by the Statute, or not? And he held that they are not extendible, first by the Common law confirmed by Mag. Charta they are not extendible. Cook upon Magna Charta, 3. & N. Brev. 227. Tithes are meerly

Extent.

Spi-

Spiritual things, and exempt from all Lay consideration, 11 Rep. 14. Pridle and Nappers case. Cawdries case, 5 Rep. f. 15. 35 H. 6. 39. where rights of Tithes are in dispute, the Common Law shall take place; but not where the Tithes themselves are in dispute: Seldens History of Tithes, cap. 14. 2ly, The Statute of Westminster makes no alteration of the Common law in this point, and non usage is a good argument to prove it; for if they had been extendible, it would sometime or other have been put in practice; and by the express words of the Statute of Westminster, the 2d. Tithes are excepted, and the process usually before that directed to the Bishop for sequestration, is not taken away by the Statute of 5 Ed. 3. 53. N. Brev. 166. Though it be a freehold, yet is it not within the Statute; and if it be within the words of the Statute, yet is it not within the meaning of it, as Cook upon the Stat. of Westm. 2. doth prove, 35 H. 5. 50. 9 E. 2. Clergy men antiently were not included in general Acts of Parliaments, because the Church was accompted as an Infant allwayes within age, and so favoured and protected by Law. Next the late Ordinance of Parliament hath made no alteration in this case; for the Ordinance intended not to punish the Parsons of Churches, although it doe out Bishops of their Bishopricks and dignities. And as to the Objection, That if the Tithes should not be here extendible, there would be a failer of justice. I answer, That our case is out of the Common law, upon which, the rule, that extraordinary courses are to be taken, rather than there should be a failer of Justice, is grounded. Roll chief Iustice said, that there are two Questions in this case, 1. Whether Tithes are within the Statute? 2ly, Whether now that Bishops are taken away by the Parliament, the Sheriffs may levy the debt of the Clergy as the Bishops used to doe? and I conceive they may, by a levari facias. But the great question is, Whether the Elegit lye? And the Court inclined it did. But you will argue it again, therefore we will deliver no opinion in it. And the Court clearly held with Mr. Selden, That Tithes are not due jure divino; and directed to search presidents, if a Recognisance had ever been extended upon Tithes.

Clergy. Levari. Elegit. Tithes.

Cane against Golding.

Mich. 1649. Banc. sup.

CAne brought an Action upon the case against Golding for slandring his title, by speaking these words, viz. His right and title thereunto is naught, and I have a better title than he. The Plaintif had a verdict. The Defendant moved in Arrest of Judgement, that the words were not actionable. Twisden of Councel with the Plaintif argued that the words are actionable; for though the words spoken of themselves may not be actionable, yet here they are alleged to be spoken falso et malitiose, and that will make them actionable, 43 E. 3. f. 33. N. Br. 95. Hob. Rep. Water and Freemans Case; and as to the Objection that is made, that the Declaration is only quod fuit verisimilis vendere, and that he was hindered by the words; and therefore there might have been no bargain made, though the words had not been spoken: The answer is, That it is well enough set forth as it is; for all treaties upon Contracts are but likely to proceed, and are not certain till the Contracts be made; but which is more, it is further alleged here, that by reason of the speaking of these words he could not receive his Tithes, which is an express loss. Hales for the Defendant argued, that the words of themselves are not actionable, although they be said to be spoken falso et malitiose, except a special damage be alleged to come to the party; for such

Arrest of Judgement in an Action upon the case, for slandering the Plaintifs title.

words as these differ from words that are spoken of the person of a man: And though there be damage, yet they are not scandalous; for the Defendant claims a title as well as the Plaintif: and the saying that the words were spoken falso & malicioſe, doth not make them to be so spoken, nor makes them actionable, if they be not so in themselves. Roll chief Iustice said, there ought to be a scandal and a particular damage set forth; but it is not so here. But move it again Saturday next. Postea.

White against Holford.

Mich. 1649. Banc. sup.

Trin. 1649. rot. 1214.

Error to reverse a judgement in Debt upon an Obligation.

A Writ of Error was brought upon a Judgement given in an Action of Debt upon an Obligation to stand to an Award, and the Error assigned was, that the Arbitrement exceeded the submission; for the submission was to stand to the award touching all matters in difference between the parties, and the award was, that the parties shall make general releases each to other of all demands; and the word demands, is a word of a larger signification than the word differences. But Roll chief Iustice answered,

Award.

That if the release be more large in words, yet it is good enough: for it shall be intended only of all matters in debate between the parties, and if there be other matters, you ought to have shewn them in pleading, otherwise the Court will not intend there are any; to which the other Iudges agreed, and gave judgement for the Plaintif, except better matter should be shewn.

Brooke against Brooke.

Mich. 1649. Banc. sup.

Mich. 24 Car. rot. 287.

Error to reverse a judgement in trespass, quare clausum fregit.

BRook brought an action of trespass quare clausum fregit, for eating of his grass with Cattel, &c. against Brooke: Upon Not guilty pleaded, an issue was joyned, and the Plaintif had a verdict and a judgement. The Defendant brought a writ of Error to reverse this Iudgement, and assigned for Error, that the Declaration was incertain; For the Plaintif declares of breaking his Close, and eating his grass, cum quibusdam averiis, and doth not say what Cattel; and so he may recover damages in this action, and bring another action for the same trespass, because it cannot be known what Cattel did the former trespass.

Barr. Averment.

Hales of Councel with the Defendant, said the Declaration was good enough; for it is good in substance, although it might have been better in form, and it being after a verdict, the incertainty is helped. And the Defendant, if the Plaintif should bring a new action for this trespass, may plead by averment that he hath satisfied the trespass don already, and aver with what Cattel it was done. Jerman Iustice said, the beasts ought to be named particularly; for averia is a large word, and signifies cattel of divers kinds; and it is too general a word to declare upon. But Roll chief Iustice answered, where the thing it self is in demand, and an action is brought for it, as it is in an action of trover and conversion, the thing ought to be particularly named; but here the action is brought for damages for breaking his Close, and eating his grass. And if you had demurred to the Declaration, it had not been a good Demurrer; but now it is

Demurrer.

after

after a Verdict which makes it stronger against the Defendant. Nicholas and Ask Justices concurred with Roll, so the Iudgement was affirmed.

Mich. 1649. Banc. sup.

The Court was moved for a Prohibition to the Admiralty upon a surmise that one was arrested there for rescuing one out of the hands of a Messenger of the Admiralty, who was taken by him by the warrant of the Court, for a contempt to the Court in a suite depending there betwixt him and another. Roll chief Iustice answered, if the cause were maritime which was depending, there the Court may examine a contempt to the Court in that cause, but they cannot proceed criminally against the party that rescued him that did the contempt. Therefore give them notice that they shew cause why we should not grant a Prohibition.

For a Prohibition to the Admiralty.

Contempt.

Prohibition.

Ireland against Michelborn.

Mich. 1649. Banc. sup.

Entred Mich. 24 Car. rot. 111.

Michelborn brought an Action of Trespass against Ireland, quare vi et armis clausum suum fregit, and for driving and beating his Cattel; The Plaintif had a Iudgement; the Defendant brought his writ of Error to reverse this Iudgement. The Errors assigned were, 1. That it appears not by the Continuando how long the Trespass continued. 2ly. There is a discontinuance to part of the plea, and a departure also. Windham in answer to the first Exception said, that it is diversis diebus et vicibus, and it is without an usque, and the continuance is but in aggravation of the Trespass. and the Action it self is for the first Trespass, which is the original, and the diversis diebus et vicibus shall be intended before the Action brought. 26 H. 6. f. 15. 35 H. 6. f. 4. Hob. rep. 377. and the party may well enough averr in another Action brought for this Trespass that the Plaintif had recovered for it in an action formerly brought, and for the new assignment he said it was but as a new Declaration. But the Court bid the Defendant in the writ of Error advise concerning the second exception. Roll chief Iustice said, he believed the case cited out of Hobard was not well printed, but something left out: for it hath been ruled that after a verdict it is good enough to say, one had imprisoned him for a long time; but here is a Iudgement upon a nihil dicit, which will alter the Case. Ierman Iustice said, it was considerable, and fit to be advised on. Holhead of Councel with the Plaintif in the writ of Error took another exception, viz. that there was an issue joyned as to the beating of the Cattel, and that is not tryed nor continued, and yet damages are given entire for the chasing and beating of the Cattel.

Error to reverse a judgement in Trespass vi et armis.

Discontinuance.

Harris against Gibbons.

Mich. 1649. Banc. sup.

Pasch. 1649. rot. 303.

Error to reverse a judgement in an Action on the Case.

GIbbons brought an Action upon the Case against Harris upon an Assumpsit, and declared that the Defendant, in consideration that the Plaintif should let unto the Defendant a Booth in Sturbridge-fair, did assume & promise to pay the Plaintif ten pound for the same, and to pay the Plaintif for all such Wine and Hops as should be spent in the Booth during the Fair. The Plaintif had a Verdict and a Judgement. The Defendant brought a writ of Error to reverse this Judgement, and assigned this Error, that it did not appear in the Declaration that the Fair was ended when the Action was brought, and consequently that there was cause of Action. But Twisden of Councel with the Defendant in the writ of Error said, it shall be intended it was ended; for the standing there during the Fair is the cause of Action. Roll chief Iustice took another exception. That the Declaration doth not express that the Plaintif gave notice how much Wine and Hops he laid into the Booth during the Fair, nor that he made any demand of the payment of any sum of money due, and so the Defendant could not know how much money he should pay, and therefore the Declaration is not good, because it is too general. Therefore advise whether you will maintain it or no, and because the Councel desired not to be farther heard in it, the Iudgement was reversed.

Declaration. Notice.

Mich. 1649. Banc. sup.

Arrest of Iudgement in an action of Covenant.

AN Action of Covenant was brought upon an Indenture for the payment of a certain sum of money at a certain time. The Defendant pleaded payment at the time, and upon this an Issue was joyned, and a Verdict found for the Defendant: The Plaintif moved in arrest of Judgement, and alleged for cause that the Issue was mis-joyned, because the place of the payment was not alleged, which is material, and so there can be no Judgement. Maynard for the Defendant moved for Judgement, and said that the Issue was well joyned, and that it was not material to allege the place of payment, because it is a personal Action, and the place shall be intended where the Action is brought, 1 E. 5. f. 3. And here he cannot allege an immaterial place, and so it must necessarily be intended to be where the Action is brought. Roll chief Iustice, If you will argue it put it in the Paper. But there is a difference between finding the money paid, and the finding it not paid.

Denoir. against Oyle.

Mich. 1649. Banc. sup.

For a Prohibition to the Court of policy for assurance.

VPon a Rule formerly made in this case to shew cause why a prohibition should not be granted to the Court of Policy for assurances Hales opened the case, as formerly had been done, and prays that there may be a Prohi-

Prohibition granted, because the party may have remedy here as well as in that Court, and so this Court ought to be preferred; and the contract here hath no relation to merchandizing, and so it doth not properly belong to that Court. Serjeant Glyn of Councel with the Defendant prayed that there might be no prohibition granted, because it hath not been known that ever such a prohibition was granted, and he recited the Statute made for assurances of 43 Eliz. and said this Case was within that Statute, and is to be tryed by the Court of Policy, and that this case doth properly concern merchandizing, and is within both the Letter and reason of the Law. And by the words of the policy it appears plainly that the Contract concerns merchandizing, & the party ought not now to suggest the contrary against his own words in the policy. Roll chief Justice said, the words of the policy are not material, for the words may be false, and the Contract may be for things not touching merchandizing notwithstanding, and the intent of the Statute is for things merchantable, and if it appear they be not so, a prohibition ought to be granted. Serjeant Glyn replyed, that the voyage depended upon the skil of the party, whose life was assured by the policy, and although the party were indebted, and there were security given by bail for his debt, to the intent he might goe the voyage, yet this is within the Statute. Roll chief Justice answered, This is a far fetch'd construction, and we cannot avoid the granting of a prohibition; but draw the suggestion and deliver it on Monday next, and joyn issue and try it this term. The Case in which this prohibition was moved for and granted was this, Denoir and Oyle were bailed for one Captain Parr (whose life was assured by the policy) in a suit against him in the Admiralty brought by one Bushel for 100 l. for fraight due by Parr unto him, and upon that Parr having part in a plantation in the Barbadoes, and a quarter part in the ship he was to make his voyage, and his life was assured by Denoir and Oyles who were his bail. Prohibition. Assurance.

Weston against Plowden.

Mich. 1649. Banc. sup.

Rot. 505.

The Court was moved for time for Sir Edmund Plowden the Defendant to plead, because the Plaintif had declared against him by the name of Sir Edmund Plowden Knight, whereas he is by Creation Count Palatine of Nova Albion, and that is now part of his name, and he must also plead a special plea. Roll chief Justice answered, he is also called a Count of Ireland, and neither the one nor the other is part of his name, as is suggested; and therefore if you will plead in Chief take a weeks time more for it; otherwise plead at your peril; for a Count Palatine of Nova Albion, or a Count of Ireland, are not additions in England. For time to plead. Addition.

Mich. 1649. Banc. sup.

A Petition was presented to Commissioners of Sewers against one for obstructing a navigable River, and prayed that the Commissioners would remove the obstructions; upon which an Order was made by the Against an Order of Commissioners of Sewers.

the Commissioners to make a view, and to certifie the matter to them, and upon this certificate a Jury was returned to enquire of the nusance, and a verdict was given by the Jury upon Articles presented unto them to enquire of it. This Order of the Commissioners, and the proceedings thereupon were removed hither by a Certiorari; and these exceptions were taken upon reading of the return. 1. That it doth not appear by what authority the Commissioners did sit. 2. The presentment made was not good, for it is said that antiently the river was so and so, and this is incertain. 3ly. The presentment is, that they know not when the Mill was made, which is supposed to be an obstruction; and if the Mill were made beyond time of the memory of man, the Commissioners have no power to enquire concerning it. Roll chief Iustice, Give notice to the Councel for the Commissioners of Sewers to answer the exceptions Wednesday next.

Shayler against Bigg.

Mich. 1649. Banc. sup.

Mich. 24 Car. rot. 90.

Writ of Error brought by the bail.

BIgg brought an Action of Trover and Conversion of a Horse, and had a Verdict and a Judgement. The bail for the Defendant in the Action brought a writ of Error to reverse this Judgement given against the principal. The Court was moved to abate the writ: The Court answered, If the writ of Error be brought upon the principal Judgement it ought to be abated. It hath been a question heretofore, whether a writ of Error brought upon the principal Judgement, and also upon the Judgement given against the bail together be good in part, and ill for other part. But of later times it hath been ruled that it ought to abate for all. Therefore let the party shew cause why the writ shall not be abated here.

Error.

Mich. 1649. Banc. sup.

For quashing an Endictment.

THe Court was moved to quash an Endictment for a forcible Entry, upon these Exceptions. 1. The party hath made no title. 2ly. The Endictment is not said to be found by the Jury, but by the Iustices. 3ly. It doth not say that the force was contra pacem publicam, as the late Act of Parliament directs, but contra pacem reipublicæ. The Court answered, it was a foul riot, and deserved no favour, yet the Endictment was quashed upon the 1 and 3 exceptions.

Dell against Brown.

Mich. 1649. Banc. sup.

Error.

BRown brought an Action of Trespass against Dell in the Common Pleas, for taking away three Cowes, and had Judgement against him upon a nihil dicit. The Defendant brought a writ of Error in this Court to reverse the Judgement. The Error assigned was, that for two of the Cowes there was no value declared, and yet entire damages were given for them all, which was not good. Roll Chief Iustice, This is a

Entire damages.

Iudge-

Judgement upon a Nihil dicit, and so there is no Verdict to help it. Postea 136.

Barber against Pomeroy.

Mich. 1649. Banc. sup.

Entred Hill. 24 Car. rot. 595. or 1095.

BArber brought an Action of debt against Pomeroy for arrerages of rent due for 7. years, and for 7. Capons; the Defendant pleaded nil debet; upon this an issue was joyned, and a verdict found for the Plaintif; the Defendant moved in Arrest of Judgement, and took this exception, that the Plaintif of his own shewing had demanded more than was due, & so ought not to have Judgement. The Question here was, Whether the Plaintif might not relinquish that part which is not due, and have judgement for so much as is due? Yard of Councel with the Plaintif held that he might, and cited Godfryes case, 11 Rep. f. 55. b. and Hubbards case, 4 Rep. and prayed for Judgement. Twisden of Councel on the other side, prayed judgement might not be given, and he agreed the cases cited by Yard, and cited other cases of the same nature, where the Plaintif may release part, and have Judgement for the rest. But he said, that here the thing is entire and cannot be apportioned, for then he shall falsifie his own writ, 1 Ed. 4. 24. But Roll chief Iustice held, that the relinquishing of part is not the falsifying of his own writ, although the thing demanded be entire; for he may as well release after the writ brought, as before; and there was no question but he might have released part before, and he may release where there is an ill demand, as well as where a demand is good. Jerman Iustice held, that Judgement ought not to be given; for he said, that the reasons of the cases cited, are not like to the reason of this case; for here the verdict is not given for the same sum which is demanded, and it doth appear that here is an unjust demand, and it is his own fault: and if the Defendant had demurred upon the Declaration, it would have been adjudged no good Declaration. But Nicholas and Ask Iustices, agreed with Roll chief Iustice, and so judgement was given for the Plaintif, except better matter should be shewn on Saturday next.

Arrest of judgement in an action of debt for rent.

Relinquishment.

Release. Damages.

Avery against Kirton.

Mich. 1649. Banc. sup.

Mich. 23. Car. rot. 239.

KIrton brought an Action of trespass against Avery, and declared upon an original, for imprisoning him till he entred into a bond of 600 l. upon Not guilty pleaded, the Plaintif had a verdict and a judgement. The Defendant brought a writ of Error, and upon the Certiorari to remove the Record, the Record was certified, and in nullo erratum pleaded, but the original in the Record certified was, that the Defendant kept the Plaintif in prison til he entred into 2. bonds of 300 l. a piece, whereas the right original was till he entred into one bond of 600 l. whereupon the party brought a new writ of Error, and by that, had the true original certified. The Councel for the Defendant in the writ of Error said, That original after original may as well be certified before in nullo est erratum pleaded,

Error upon a judgement in trespass.

Certificate.

as

as afterward; but here the parties are at iſſue, and the firſt original is certified, and iſſue joyned upon that, and there cannot be a new original certified; and the original here doth not agree with the other parts of the Record, and ſo cannot ſupport it, and our original certified ſtands with the Record, and here is no Certiorari to warrant the original here certified, and it is a material variance, 3 Iac. Banc. Reg. Cummins caſe, 9 H. 6. f. 38. Paſch. 1649. Kedgwins caſe. Yard on the other ſide anſwered, that now the original is certified, and is before you in this Court, and you ought to judge as it is, and not as it ought to be; and it is agreeing with the former proceſs. And both the originals were before the Declaration, and the Court ſhall take the right original, and the other ſhall be intended for another cauſe. Roll chief Iuſtice ſaid, The Certiorari is general, and not inter partes prædict. but the certificate is inter partes prædict. And the Court may take the right original that is certified, and the Iudges are not bound by the plea in nullo eſt erratum that is pleaded, but may grant a new original writ of Error, but the party cannot require it, for he is concluded by his own plea; and if he diſcontinue his original, he may have a new, but not if he plead, and the Certiorari is good, and well certified, and therefore judgement ought to be affirmed. Ierman, Nicholas, and Ask to the ſame effect; and ſo judgement was affirmed, except better matter ſhould be ſhewed Saturday next.

Original. Certiorari.

Ratcliff and Dudeny.

Mich. 1649. Banc. ſup.

Entred Hill. 23 Car. rot. 369.

A queſtion upon the caſe falling out upon a ſpecial verdict.

Upon a ſpecial verdict, the caſe was this, A leaſe of a houſe and lands was made to I S. for 99 years, the remainder to I D. for 99 years, the remainder to A. B. for 99 years; provided, that if the leſſees doe not inhabit in the houſe let during the whole term, that then the leaſe ſhall be void. The queſtion here was, How long the leſſees were bound to inhabit in the houſe? whether for the firſt 99 years? or for that term, & alſo during all the years in remainder? and which of the leſſees were to inhabit? Windham held, that the two firſt leſſees only ought to inhabit during the firſt 99 years, and no longer. But Roll chief Iuſtice held, that thoſe in the remainder were not bound to inhabit before the remainder falls to them; but reddendendo ſingula ſingulis they ought to inhabit ſucceſſively one after another. And he took an exception to the verdict. That the leaſe being to begin after the death of one Robert Dudeny, it did not find that Robert was dead, and ſo it appears not that the leaſe is yet begun; and ſo there can be no queſtion ſtirred as yet: and thereupon the caſe was not argued, but a Venire facias de novo was to iſſue, becauſe the ſpecial verdict was imperfect.

Venire.

Cane againſt Golding.

Mich. 1649. Banc. ſup.

Opinion of the Judges upon an arreſt of Iudgement in an Action of the caſe.

This caſe, formerly ſpoken to and argued, being an Action of the caſe for ſlandering the Plaintifs title, was now ſpoken to by the Iudges: And firſt by Roll chief Iuſtice, who held that the Action did not lye, although it be alleged that the words were ſpoken falſo et malitioſe; for the Plaintif ought to ſhew a ſpecial Cauſe: But that the verdict may ſupply. But the Plaintif

Plaintif ought also to have shewed a special damage, which he hath not don, and this the verdict cannot supply. The Declaration here is too general, upon which no good issue can be joyned: and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them, the sale was hindred, and he cited 13 Iac. Tuer and Bailyes case, B. R. & 21 Iac. Doctor Edwards and Balls case, and 4 Car. Roe and Harwoods case, a Judgement in it in Windsor Court, and reversed here: and 12 Jac. Sell and Paryes case, B. R. Ierman Justice to the same effect: and he said, that there ought to be damnum et injuria alleged to maintain the Action; for one without the other is not enough, and here doth not appear any damage, because there appears no communication of selling of the land. Nicholas and Ask Justices of the same opinion: So the rule was, Nil capiat per billam, except better cause shewn. Roll Justice said, that there is digitus Dei in the case; for there was a strange verdict found. Case.

Mich. 1649. Banc. sup.

The Court was moved for a Supersedeas for the Earl Rivers, who was Arrested by a bill of Middlesex, and is in custody of the Marshall of this Court, because he is Peer of the Realm, and ought not to be arrested. The Court answered, You must plead your privilege if it be so; for we cannot take notice of it upon a motion. For a Supersedeas for a Peer of the Realm denyed. Privilege. Notice.

Ridley and *Emerson*.

1649. Banc. sup.

Pasch. 24 Car. rot. 400.

The case between Ridley and Emerson was again spoken unto. It was in a writ of Error to reverse a Judgement given in an Action of debt upon an Obligation in the Common Pleas. The Condition of the Obligation was, that the Defendant should not put cattel upon a Common, viz. Ransom Moor, before the proof and tryal of the title of the Common were had. The Defendant pleaded, that he did not put in his Cattel. The Plaintif replied, that the Defendant did put three Mares there before the proof or tryal. An exception was taken, that there is variance between the Replication and Rejoynder, and the Condition of the Obligation, and so it is not good. Twisden of Counsel on the other side, held that it was good enough notwithstanding, because it is after a verdict, and there is a good issue joyned. Holhead on the Contrary held it ill; 1. Because the Replication doth not assign a breach of the Condition of the Obligation. 2ly, It is said in the Condition, he shall not put Cattel into our Common; and the Replication is, that he did put cattel into such a Common, naming it, and doth not shew where the Common lies. 3ly, There is variance between the Declaration and the writ of error. 4ly, There is a name mistaken, for in one place it is Matheum, and in another it is Mathiæ. The Court bid them advise, and bring Books to the Iudges. Argument in a writ of Error to reverse a Judgement in debt upon an Obligation. Variance.

Brungy against Lee.

Mich. 1649. Banc. sup.

Trin. 1649. rot. 1491.

Demurrer upon a Plea in Trespass.

BRungy brought an Action of Trespass against Lee, for taking of a Mare and impounding her till the Plaintif had payed 10 l. The Defendant pleaded by way of Justification, that he did distrain her by virtue of an order made by Commissioners of Sewers, for a tax assessed by them upon the Plaintif. The Plaintif demurred to this Plea, and shewed for cause, 1. That it doth not appear, that the Commissioners who imposed the Tax had authority to do it, for it ought to be done by six of them, and it doth not appear here, that they were more in number than four. 2ly. It doth not appear, that they were all of them of the Quorum, as they ought to be. 3ly. There doth not appear to be any fault in the Plaintif, why he should be taxed. 4ly. The number of the Acres of Land doth not appear upon which the Tax was layd. 5ly. It doth not appear, that the Land taxed did lye within the Jurisdiction of the Commissioners. Upon these Exceptions the Plea was over-ruled.

Plea.

Coles against Sibsye.

Mich. 1649. Banc. sup.

Demurrer upon a replication in Trover and Conversion.

COles brought an Action of Trover and Conversion against Sibsye; The Defendant pleads the Statute of Limitation of Actions in Bar. The Plaintif replyed, that he took out a Latitat such a Term against the Defendant for this cause now depending, which was within the time limited by the Statute. To this replication the Defendant demurred, and for cause shewed, that it was incertain, and so no issue can be joyned upon it: for it only says, that he took out a Latitat such a Term, and doth not shew what day of the Term he took it out, and so we cannot take issue upon it, and the usual form is to shew the day. Latch maintained the replication, and said, it was good in matter of substance, and the Latitat shall be intended to issue forth the first day of the Term: for all the Term is but one day in construction of the Law, and the Defendant may take a certain issue, as it is pleaded. Roll chief Justice answered, you ought to have shewed the teste of the Latitat: for the time is material in this Case, viz. to know whether it were sued forth within the time expressed in the Statute for the limitation of Actions, or without, namely within six years or no, and you might have made it certain by your pleading it specially. Jerman differed in opinion; and thereupon the Court took time to advise. Vid. antea.

Term.

Time.

Custodes, &c. against the Inhabitanrs of Owtwell, Tyd. Newton, &c.

1649. Banc. sup.

For exceptions and answers to them, upon a return of Commissioners of Sewers.

VPon a Return read of certain orders made by Commissioners of Sewers, against the Inhabitants of Outwell, removed hither by the said Inhabitants, by a Certiorari, These exceptions were taken, 1. There doth

doth not appear to be any adjournment of the Commission. But to this the Court answered, that it needed not. Hales said, that the charge of reparation of a breach in Sea-walls, which happens by inevitable necessity, ought to be repaired by the whole Level, and not by any particular Hill or person. And 2ly. the charge ought to be laid indifferently: but here is a particular Custome of which the Commissioners of Sewers may take notice, and therefore the Commissioners are not compell'd to lay the tax equally upon the Lands within the Hill, for the Custome may be to the contrary, and yet have a reasonable construction, and this is the Custome of Marshland for the speedy repair of breaches to prevent publique danger, and afterwards the tax is equally distributed upon the Hills adjacent. And an implication in a Return made by Commissioners of Sewers is good enough. Maynard on the other side held, that the Custome was well set forth for the general charge for the present necessity, and afterwards the particular Inhabitants charged shall have remedy against the other Inhabitants to make them contribute, as it was in Doctor Lambs Case, that was slain in an Uproar in London, where the City was fined generally, but the Citizens afterwards contributed to the payment of it: for all are lyable to the charge by the Common law, and it may be also by the prescription. The Court reproved the Counsel, and said, you ought not to argue two of you at one time on the same side, except it be upon conclusion of the arguments at Bar in the cause. Roll chief Justice said, the tax ought to be particular, but it is not to be laid upon the Township, if there be not a Custome for it, and such a Custome may be reasonable, and it is dangerous to destroy it, for fear of the publique danger that may arise by doing it. And for the return of the Commissioners it is not necessary it should be so strict as our pleadings are. The Court gave Twisden time till that day seven night to be heard on the other side. At which time to the exception that was taken, that it appears not that Lynn Regis is within the limits of the Commission by virtue of which the tax is made; It was answered, that it doth appear. To the second exception taken, that here is a new Bank or Wall ordered to be made, and not the repairing the old, and this is not within the Commission; It was answered, that the making of the new Bank is but to strengthen the old Bank, and so is but a repairing of an old work, and not the making of of a new. 2ly. The Wall is to be made by consent of all the Inhabitants interessed in the benefit, which may accrue by the making of it. As to the exception that it appeares not that Tyd and Newton are within the Hundred of Wisbitch, touching which only this Commission of Sewers was granted; It was answered, that it shall be so intended, and it is also so found. To the exception, that the new Bank was made in another manner than the old Bank, and so it is a new work, and it appears not that the parties tared have any benefit by it; It was answered, that it doth not appear that the Drapners have done any thing for their own benefit in the making this Bank, nor were any cause of making the new Bank. To the exception that it is not preferred where the Bank is; It was answered, it is certain enough set forth in the Presentment, and Presentments are not required to be so precise as other pleadings are. To the exception that Tyd and Newton ought not to make the Bank because other Towns use to do it. It was answered, that for making it in the new manner, the other Hills are not bound to make it alone, but those also that receive the benefit by it. These exceptions following were also taken to the laying of the Tax. 1. That all the Lands within the Hills of Newton and Tyd are not charged, but so many Acres in one, and so many in another. To this it was answered, that it doth not appear that there were more Acres than are tared either in Tyd or Newton. 2ly. The high grounds and the low grounds are equally tared, which is not indifferent: for some

Adjournment.

Custome.

Return.

10 Ed. 3. f. 8, 9.

Return.

acres are of a greater value than others are. To this it was answered, that for ought that doth appear they are of an equal value. 3ly. They ought not to sell the distress taken, because the Mills did not bring in the number of acres, by the Officer appointed by the Commissioners to doe it. It was answered, that they may sell the goods, or allow a Replevin: And secondly here appears not to be any distress or impounding of the goods. Serjeant Barnard on the other side: First he said, that all the exceptions are not opened, and the first exception is not answered; for it appears not by averment that the Mills taxed are within the extent of their Commission, as it ought doe, 2 H. 7. f. 13. Nor is the second Exception answered; and although the Counsel might at the finding of the Commission have taken it, yet it may be taken now; and it is not shewed how the old bank was insufficient, nor what the charge would be to repair it; Nor is it shewed how Tyd and Newton are in danger by the not repairing and making of the new bank. Also the Commissioners have exceeded their authority in exceeding the antient manner of taxing for the maintenance of this bank, and the tax ought to be laid according to the quality and quantity of the lands, which are to be taxed, and here doth not appear how many acres are in the several Mills, nor whether the tax doe extend to all, and the good lands and bad lands are also equally taxed, neither ought there to be a new tax imposed upon one Mill to ease another, which by the custom ought to repair the bank: And they have also made a new Officer here, which by the Statute they have not authority for, & have made an order to punish one for refusing this Office, by distress of his goods, which ought not to be; and they ought not to refuse a replevin of the distress taken, as they have here done, and the lands only that are lyable to the tax are to be distrained for it, and not the goods of another that is not within the extent of the Commission, and upon these exceptions he prayed the presentment might be quashed. Roll chief Justice answered, we will not make all the law void for some exceptions, therefore give notice upon what exceptions you will stand upon. Maynard answered, upon these. 1. That there ought not to be such a tax laid, because the lands taxed are not within the extent of the Commission; for it appears not that they are within the Hundred of Wisbitch. 2ly. All the Inhabitants within all the Mills are not taxed, which ought to be, because they have equal benefit, as it appears by the presentment. The Court ordered it should be moved again the next term. And Roll chief Justice asked why the drainers should not discharge this charge, who have been the cause of it, and they receive benefit by their draining; and it is not fit they should prejudice others by it. Postea.

Pymm and Morgan, alias Bambery and Basely.

Mich. 1649. Banc. sup.

Argument upon a special verdict in an Ejectione firmæ.

This case was again moved upon a special Verdict in an Ejectione firmæ, wherein the question was, Whether the estate of Mary Morgan that was setled 13 Car. is taken away by the Ordinance of Parliament made 1645. and which looked back to 1641. which was after 13 Caroli. It was held by the Counsel that argued against the Ordinance that it was not, because the Ordinance is made against a dead man. 2ly. The estate of Morgan was forfeited to the State, and they out of it doe make an estate for Pymm, with retrospection to the year 1641, and no further; and therefore the estate

state setled before that time is not taken away: And if a Statute have a double sence, one against Common Justice, and the other with Common Justice, in equal ballance, it shall be interpreted in the better sence; and that that hath been objected, that there is a power of revocation in the settlement is not material; for Morgan is now dead, and so this personal power is now gone, and shall not hurt the settlement. A second reason is taken from the scope of the Ordinance, which consists of three parts: 1. The Parliament injured. 2ly. Morgan the Offender punished. 3ly. Pymm rewarded, and the Ordinance shall not be stretched to punish Mary, who hath a particular interest, although there be not an express saving for her in the Ordinance, 21 H. 7. 4. Plow. Comment. 487 7 Car. Porter and Bellingham, and that this is the meaning of the Ordinance may appear, because the remainder is reserved to the Common-wealth; and in doubtfull Constructions of Statutes and Ordinances, that shall be taken, which makes all parts of the Ordinance or Statute stand together, and such is the Construction here in not interrupting the estate of Mary. But it is objected, that the right of the Daughters is provided for if they claim from another Ancestor, and not from Morgan their Father. It was answered, that there is the same reason to provide for Morgans estate that was rightly conveyed from him before the year 1641. as of a strangers so deriving from Morgan. It is also objected that the Trustees for Pymm and the Common-wealth shall have Morgans lands, and they shall not be said to be forfeited. It was answered, that the Act distributes no more than is forfeited, which can be no more than Morgan had at that time. 2ly. The Parliament took no notice that Morgan was seized in fee simple, nor what estate he had. 3ly. After the estate of Mary Morgan ended, the reversion in fee returns to Thomas Morgan, so that Mary hath but a particular estate, and the Ordinance may be satisfied though Mary Morgans estate be not forfeited; for the reversion may be forfeited, and the particular estate preserved, as Cleres Case is; and the saving is not here repugnant, as it is objected, nor destroyes the generality of the Ordinance, for it is here satisfyed. And the Parliament doth not take notice of the conveyance made by Thomas Morgan, nor of any other estate than that he had at the time of the making of the Ordinance; otherwise there would be a great inconvenience; but it is objected, that the Sons claiming under Thomas Morgan are excluded out of the saving. It was answered, that although they are, yet they are not excluded out of the body of the Act, Dyer 273. 10 Eliz. and here the excepting of the interest of the Daughters in the saving hath its effect, viz. the estate which they have of Thomas Morgan after 1641. which shall be given by the Ordinance, and not that which they had before, and so prayed judgement for the Plaintif, viz. Mary Morgans lessee. Maynard for the Defendant, viz. Pymms heir said, That the Act is the rule to measure our case by; and that the Act doth take away the right of all the Children, and that the saving helps none but strangers, and notwithstanding the recompense reserved for Pymm, if the estate shall be short, it is intended of such an estate not within the saving; and the estate of the Children is not within the saving, and here is not a general gift, but these lands particularly; And in this case Morgan had power to revoke his settlement, and so there is no breach made by the Ordinance of Common Justice, as is objected; because he had an interest in the estate, notwithstanding the settlement. And all parts of the Act stand very well here together upon the best construction of it, according to the makers intent. If I grant all my trees, fruit-trees will not pass; but if I except all my Apple-trees, all other fruit-trees pass, and the inheritance in Morgan doth not satisfie the Act, and so prayed Judgement for the Defendant. Roll chief Justice said: Mr. Maynard

Interpretation.

nard you mistake the first part of the Ordinance, for do you think that the Ordinance looks further back than 1641. in other lands not expressed? and he seemed to encline for the Plaintif, but the other Judges for the Defendant. But the Court concluded that it was a great case, and deserved great consideration, and therefore ordered, That it should be argued again the first Saturday the next Term.

Mich. 1649. Banc. sup.

For a Habeas Corpus for one committed for suspition of felony.

THe Court was moved upon an Affidavit for a Habeas Corpus for one committed for suspition of felony, for uttering counterfeit money, because the Justices will not bail him. Roll chief Justice said, It is dangerous to remove such a prisoner, and there is a Commission of Oyer and Terminer to try such Offenders; and we have no Copy of the Mittimus now, but if you bring it we will make some rule in it. If the prisoner be bailable, if the Justice will not bail him, bring your Action against him.

Mittimus.

Case.

Coswell.

Mich. 1649. Banc. sup.

To reverse an Outlawry.

ONe Coswell outlawed moved to reverse the Outlawry upon these exceptions. 1. Instead of proxim. there is used px. for an abbreviation of it, without any dash. 2ly. Instead of Infra scr. the abbreviation of infra scriptam there is used infra sr. And for these exceptions it was quashed.

Abbreviation.

Dell and Brown.

Mich. 1649. Banc. sup.

Error upon a Judgement in Trespass.

IT was moved formerly to reverse a Judgement in an Action of Trespass for the taking away of three Cowes, because the Declaration doth not say neither precii nor ad valentiam as to two of the Cowes. Serjeant Earl moved for Judgement notwithstanding that exception, for he said it was not necessary to express either, and urged 19 E. 2. br. f. 842. and Pas. 20 Ed. 3. f. 2. 8 H. 6. reg. 97. b. But Roll chief Justice answered, That which you urge is against the received opinion; for if they be live Cattel that are taken, it ought to be precii; but if dead, it ought to be ad valentiam. Therefore shew cause before the end of the Term why the Judgement should not be reversed.

Declaration.

Spry against Mill.

Mich. 1649. Banc. sup.

Pasc. 1649. rot. 208.

Error to reverse a judgement upon a nihil dicit in a Trover and Conversion.

SPry brought a writ of Error to reverse a Judgement given against him upon a nihil dicit in an Action of Trover and Conversion for a Mare, in the Court at Lanceston in Cornewall, and these Errors were assigned: 1. In the judgement it is said ideo ad eandum Curiam consideratum est;

Where-

whereas it ought to be per eandem Curiam. 2ly. It is recuperare debeat, whereas it ought to be debet. But Roll chief Iustice answered, that is well enough in a judgement upon a nihil dicit. 3ly. In the awarding of the Venire, it is præceptum fuerit. 4ly, It is for the Jury to enquire in forma prædicta. 5ly, The Defendant is not demanded. To this Roll chief Iustice said, The Defendant did appear, and so that is not material. 6ly. It is said Consideratum fuit, and it should be Consideratum est. Roll chief Iustice said, that was a good exception for the incertainty of the words. Upon this, Prestwood the Councel on the other side moved, that the Record is not removed; for the Certiorari to remove it was directed to the Maior and the Recorder, and the Record is returned by the Maior and Deputy-recorder. Roll chief Iustice said, It appears not to us that the Recorder hath power to make a Deputy. Therefore advise upon it, and so will we. Postea.

Judgement.

Error.

Certiorari.

Mich 1649. Banc. sup.

A Return made by an Officer of the Admiralty for one committed by their warrant, was read, and it was prayed by Hales of Councel with the Prisoner, that the return might be filed, and the Prisoner discharged for these reasons: 1. the party was committed for rescuing himself: and 2ly, for a Contempt to the Court, and because he would not find bail: and it appears that the warrant for his commitment is not good; for he is not committed for matter arising upon the Sea, and so they have no Jurisdiction. But the Court bid them proceed upon their prohibition, for they would not release the prisoner. But if you will you may move it again Friday next.

To discharge a prisoner upon a return by an Officer of the Admiralty.

Bail.

Gilbert against Marden.

Mich. 1649. Banc. sup.

Trin. 1649. rot. 942.

A Writ of Error was brought to remove a judgement given in the Common pleas in an Action upon the case. Upon opening the record, Twisden took exception that the record was not removed; for the Judgement in the Common pleas was given Coram Petro Pheasant, and the writ of Error was to rectifie a record, quod coram vobis residet. The Court abated the writ of Error for this exception.

Error upon a judgement in the Common Pleas.

Abatement.

Smith against Andrews.

Mich. 1649. Banc. sup.

ANdrews, an Attorney, brought an Action upon the case against Smith, for speaking of these words against him, He, meaning the Plaintif, stirrs up men to sutes, and promiseth, that if he recover not for them, he will take no fees; and yet in a sute which he so undertook for me wherein I was overthrown, he took Charges of me. Upon not guilty pleaded, there was a verdict and a judgement for the Plaintif. The Defendant brought a writ of Error, and for cause it was shewed by Maynard, that there are entire damages

Arrest of Iudgement in an action on the case.

mages given for divers words spoken at one time, whereof some are Actionable, and others not, which ought not to be: and 2ly, The words in themselves are not actionable; for an Attorney may stir up men to suites, if their suites be lawful; (which Roll chief Justice denyed) 17 Car. Gibson and Baxter. And he said, that an Attorney may prosecute his Clients cause without fees, and yet it is not maintenance, Trin. 16 Car. Hill and Sands his Case. Hales on the other side held that the words are Actionable; for the words shall be taken in the worst sense: and he also shewed how he had stirred up suites in an unlawful manner, viz. by making of bargains with men at Markets. Roll chief Justice said, that such words shall be taken mitiori sensu, and this is a special maintenance, for it is in the case of an Attorney, and therefore lawfull; but here are other words spoken to shew that he stirred up suites unlawfully; and the stirring up of suites and making bargains to follow them, is in it self unlawfull, and great inconveniences doe grow by such manner of practising, and all the words ought to be taken together, and not dividedly; for so you may make any words not actionable. Jerman Justice held the words were actionable; because they are a great scandal, and trenching to destroy the Plaintifs livelihood & practice. And said, that Attorneys ought not to go to Markets to get practice, & the words spoken are to shew he is a stirrer up of suites, and to shew that he was a false dealer, and the words shall be taken in the Common acception, and not mitiori sensu. Nicholas as Jerman; and that the words taken together are actionable. Ask Justice to the same effect. Whereupon Judgement was affirmed, except better matter should be shewn Monday next.

Maintenance.

Johns against Leviston.

Mich. 1649. Banc. sup.

Arrest of Judgement in an action upon an Assumpsit.

JOhns brought an Action of debt against Leviston upon an Assumpsit that the Defendant would enter into a Judgement unto the Plaintif for so much monies as Sir John Hall did owe unto the Plaintif, if the Plaintif would take Common bail of him the Defendant, if Hall should die before such a day, and for not performing this promise the Action was brought; upon non Assumpsit pleaded, there was an issue joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgement, and shewed that it doth not appear that there was any notice given by the Plaintif to the Defendant, how much mony was due to the Plaintif from Sir John Hall, as there ought to be. Roll chief Justice answered, You did undertake to know, at the time of the Assumpsit, how much mony he did owe, and notice is not necessary, and if it were, he might have gone to Sir John Hall to tell him, and so it shall not only be intended to be in the knowledge of the Defendant himself, but that he might have also knowledge of it by others. Jerman Justice doubted, but Nicholas and Ask Judges were of Rolls opinion, and the Plaintif ordered to take his Judgement, if better matter were not shewen.

Notice.

Custodes Libertat. &c. against the Inhabitants of Outwell.

Mich. 1649. Banc. sup.

Exceptions upon an order of Commissioners of Sewers, and answers to them

THis Case was again moved: wherein upon a presentment made to Commissioners of Sewers, an order was made by them to reimburse the

the Dike-reves, for money expended in repairing a Sea wall, by laying a tax upon divers Mills, amongst which Owtwell was one: divers exceptions had been formerly taken to the presentment and order. At this time it was 1. objected, that the Commissioners cannot alter the usual custom for making the tax, as they have here done: and therefore their Order is not good. It was answered, that there is no custom here presented; but if there be, yet the tax cannot be laid generally upon the Mill, but distributively; for every one of the inhabitants have not an equal share of the land, nor are all the lands of equal goodness: And there is no custom for the Mill of Owtwell to apportion the tax, so that they have no authority to doe it. Windham on the same side said, that there is no prescription or custom here found, and so the tax ought to be ruled by the Common Law, and other Towns ought thereby to be Contributory, which receive benefit by the making of the bank; and the Commissioners of Sewers have not here pursued the direction of the Statute of Sewers as they ought to doe. And here the presentments upon which this order for the tax was grounded, were made by three Juries of several Hundreds, and the breach to be repaired doth not appear to be within any of the Hundreds whence the Juries come, as the Statute doth direct, neither to it shewed how the inhabitants are chargeable, whether by tenure, or custom, or how else. Holhead on the same side said, It is not said how the lands are lyable to the tax. 1. It is not shewed in what part of the Poe-Dike the breach hapned. Maynard on the other side said, that the Commission of enquiry finds by what default the breach happens, but they cannot tell how many acres every one holds, to charge them several; and it may be intended that they hold joyntly, and it shall be intended that the lands are lyable to the tax by prescription, and it is not necessary to shew in what place of the Poe-Dike the breach happened. Roll chief Iustice said, the prescription here is waived; for you say that it was not an inevitable breach, and so you are at the Common law, and not upon a custom, and then the tax ought to be equal, and according to the number of the Acres, and it is not so here. And it appears not that the breach is within the Hundreds whence the Jury came and so they have no authority to enquire. Hales said, that there is a clause to help this, for there is a power in the Commissioners to ease them that have wrong done to them. Roll chief Iustice, This will not help, for the tax ought to be well and equally laid, according to the Statute, viz. upon the number of the Acres, and here it is laid upon the persons of the inhabitants. Therefore make a new tax. Tax.

Archer against Holbidg.

Mich 1649. Banc. sup.

In this case the Action being an Action brought upon the Statute of 1 R. 3. Cap. 3. and a verdict for the Plaintif, it was formerly moved in arrest of Judgment, that the Statute was misrecited; whereupon it was ordered the Parliament Roll should be brought in Court, which was now done, and read, and upon the reading it appeared that it was misrecited; for the Statute was for suspition of felony, and the Declaration was for felony: whereupon it being held by the Court to be misrecited in matter of substance, whereupon the Action was grounded, The Court ordered a nil capiat per billam. Arrest of Iudgement in an action upon the Stat. of 1 R. 3. cap. 3. Misrecital.

Mich. 1649. Banc. ſuper.

For reſtitution upon an Indictment of forcible entry Reſtitution.

AN Indictment was found againſt one for a forcible entry: The Defendant traverſeth the Indictment, and enters his traverſe & pleads. The Plaintif moved the Court upon a ſuggeſtion that there had been divers verdicts found for this land for the Plaintif, that the Plaintif might have reſtitution. But the Court would not grant reſtitution before the tryal, becauſe the Defendant had traverſed and pleaded.

Mich. 1649, Banc. ſup.

To diſcharge iſſues for not repairing the high way. Quaſh.

THe Court was moved to diſcharge the iſſues ſet upon the inhabitants of Bridgwater, for not repairing a High way, and to quaſh the Indictment, upon a Certificate that the way was repaired. The Court anſwered, that further proceſs ſhould be ſtayed, and the iſſues diſcharged: But we cannot diſcharge the Indictment, if you have no exception to take againſt it.

Mich. 1649. Banc. ſup.

To quaſh an Indictment for ſelling bread under the Aſſiſe.

THe Court was moved to quaſh an Indictment againſt a Baker for ſelling of bread under the Aſsiſe. The exceptions were, 1. That it doth not ſay what Aſsiſe, whereas there be divers Aſsiſes of bread. 2ly, The Indictment doth not ſhew where he ſold the bread, nor to whom. Roll cheif Iuſtice ſaid to the firſt exception, It is good enough to ſay he ſold the bread contra aſſiſam, although it ſay not what aſsiſe; but upon the ſecond exception the Indictment was quaſhed.

Earl Rivers againſt More.

Mich. 1649. Banc. ſup.

Privilege of Parliament pleaded.

THe Earl Rivers was taken by a Latitat and committed to the Marſhalſea; The Earl by his Councel pleaded his privilege of Peerage, and prayed he might be ſet at large. Roll chief Iuſtice asked, How is the plea now amended? for yeſterday you pleaded in abatement of the writ, and now you pray to be delivered upon a bare ſuggeſtion. Wild of Councel with the Defendant held, that a Capias doth now lye againſt an Earl; for comes dicitur a Comitando rege, & ceſſante rege ceſſat comes, And demurred to the plea for want of form. Roll chief Iuſtice ſaid, That Earls and Barons are antient titles of the Realm. But let him plead as he will ſtand to it, and adviſe well of the plea before the Demurrer joyned; for we can give leave to amend the plea.

Capias.

Amendment.

VVare againſt Chappell.

Mich. 1649. Banc. ſup.

Demurrer to a plea in Covenant.

VVAre brought an Action of Debt for 500. againſt Chappel, upon an Indenture of Covenants between them, viz. That Ware ſhould raiſe 500 Souldiers, and bring them to ſuch a port, and that Chappel ſhould find

find shipping and victuals for them to transport them to Gallicia; and for not providing the shipping and victuals at the time appointed, was the Action brought. The Defendant pleaded, that the Plaintif had not raised the Souldiers at that time; and to this plea the Plaintif demurs. Windham of Councel with the Plaintif, held, that the Defendant ought to have provided the shipping and victual against the time, though the Souldiers were not raised; for the not raising of the Souldiers can be only urged by way of mitigation of damages, and not pleaded in discharge of the breach assigned. Yard of Councel with the Defendant, held the plea was good in barr of the Action, for the Covenants of each part have relation one to the other, and there is a condition precedent made by the words, to find shipping for the Souldiers: so that the Defendant was not to find shipping, except the Plaintif raised the Souldiers, neither is there any notice given us how many Souldiers he had raised. Roll chief Justice held, that there was no condition precedent; but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of the men raised, for the number is known to be 500. and the time for the shipping to be ready, is also known by the Covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping. Herman and Nicholas Justices, held against Roll, that there is a precedent condition. Ask Justice was of Roll the Chief Justices opinion, Nicholas changed his opinion, and so judgment was given for the Plaintif, except better matter were shewn.

Precedent condition.

Notice.

Jenkinson against Porter.

Hill. 1649. Banc. sup.

Pasch. 1649. rot. 237.

These Errors in the Record were assigned, to reverse a judgement given in the Court at York in an Action of debt. 1. That the time of the Judgement is in figures. 2. The sum recovered is in figures. 3ly. Venire is not good, for it is Venire facias duodecim, &c. which is not good with an &c. in an inferiour Court. 4ly. It doth not appear that the cause of Action is infra jurisdictionem Curiæ. And for these errors the judgement was reversed, nisi, &c.

Error to reverse a Judgement in debt.

Weston against Plowden.

Hill. 1649. Banc. sup.

Mich. 1649. rot. 503.

This case formerly spoken to, was again moved, which was this in effect: Weston brought an Action of debt against Plowden, upon an Obligation of 2000 l. for the payment of 1000 l. The Defendant appears and imparls, and after imparlance, pleads in Abatement of the writ, that he is Earl of Nova Albion in Ireland, and ought to be impleaded by that name, and not by the name of Edmund Plowden Knight: upon this plea the Plaintif demurred; 1. Because it came in after imparlance, whereas a plea in abatement of a writ, ought to be pleaded before imparlance. 2ly. The plea is frivolous; for he pleads that he was Earl of Nova Albion before he entred into the bond, which he cannot now plead, for he is estopped to plead so by his own deed, which testifies the contrary. Roll chief Justice said, it is a di-

Plea in abatement, after imparlance.

Plea.

Estoppel.

later plea, for he is but a Knight here, though he be an Earl in Ireland, and his own Obligation stops him from pleading as he doth. And therefore let him shew cause why he shall not plead in chief within a week, otherwise let Judgement be entred. Vid. antea.

VVats and Dix.

Hil. 1649 Banc. sup.

Entred Trin. 24 Car. rot. 1529.

Argument upon a special verdict in an ejectione firmæ.

A Pejectione firmæ was brought for certain lands in Lincolne Shire, and upon not guilty pleaded, there was a special verdict found to this effect. I. S. being seised of the Lands in question in Fee made a Feoffment thereof to A. B and C. D. and to their Heirs till they should make a Lease of the said Lands for divers years to certain uses, to begin at the Feast of Philip and Jacob next comming; The Feoffees enter, and make a lease for years of the Lands to begin from the Feast of Philip and Iacob next. The question was whether the Feoffees have made such a Lease as the deed of Feoffment directs, and so the uses are raised thereupon, or whether it shall be intended another lease, and not warranted by the Feoffment, and so no uses raised; Latch held that the Lease is not warranted by the deed of Feoffment, and that there are no uses raised, for the words at the Feast, and the words from the Feast make several beginnings of the Lease, and so here is another Lease made than the deed intended. 2ly. It is not in effect and intention the lease of the parties, because it is not made according to their directions, and so there are no uses raised, for the authority is not pursued, nor the precedent condition observed, and so the lease hath another beginning, and another ending, and so it must be another Lease, Fitzh. graunts 63. And here is not the same reversion intended to the party, viz. his Son Watson, because it is upon another Lease, and so a different reversion. And although the Jury might have found the intent of the party, and so the same Lease, yet they have not found it, 2. rep. Crumwells case. 5. rep. Earl of Rutlands case, and if the Jury find evidence only, and not matter of fact, the Court can give no Judgement, 9. rep. Downhams case, the meaning of the party ought to be found, Oxfords case 10. rep. 11. Iac. Banc. Reg. Isack and Clarkes case, 3 Ed. 6. Bendloes Reports. As to the second point, viz. whether the use shall result to the Feoffor or remain in the Feoffees, he held that it doth result to the Feoffor; and remains not in the Feoffees; For first there was no other thing intended to be in the Feoffees than to make the lease good. and that is not here done, and Dyer 300. cited is not to this purpose. The intention of the parties is not prevalent in directing of uses, and Dyer 300. may be applyed to our case to determine the use, 4. rep. 82. Barbers case, Mich. 2, & 3 Eliz. Bendloes Reports the use reverted: Dyer 16 Eliz. Humphrestons case. An estate ought to be made in convenient time, otherwise the use is to revert out of the Feoffees to the Feoffor, according to his first estate. 3ly. For the question whether a good estate passe to Elizabeth, and the others, he held that there did a good Estate passe either by bargain and sale, or otherwayes. But it is good by bargain and sale, notwithstanding it be upon consideration past, which is no consideration, and the other consideration expressed to raise the use hurts not, and here is a good consideration, Mich. 8 Iac. Gosman and Carington, C. B. There was no good consideration; but a curtesie, 13. and 14 Eliz.

14 Eliz. Horwoods case there was a good consideration., although there be no monies paid, but land for land. 2ly. If it doe not pass by way of bargain and sale, yet it shall pass by way of Covenant to stand seised to uses, and the consideration expressed is good to raise the uses: Bedles case 7 Rep. & these considerations cannot be silenced by the considerationsof bargain & sale; nor shall the intent to pass it by way of bargain & sale hurt it, & if he take by way of use, yet it makes not the joyntenancy operate as a tenancy in Common, & so it is the same lease declared upon, and not divers, and there is no disseisin by the entry of the Lessee at election; for though he be not Lessee by the Lease intended, yet he is Lessee by the one Lease or the other; for the Lease is made either by the Feoffor, or by the Feoffee, and so he prayed judgement for the Plaintif. Pannell for the Defendant put the case at large, and made these questions. 1. Whether here be such a Lease as the first Indenture doth direct. 2ly. If the use do not arise where the estate is. 3ly. Whether there be a good bargain and sale. 4ly. Whether there be a good consideration to make a bargain and sale. 5ly. If there be not a good bargain and sale, whether it shall enure by way of Covenant to stand seised to a use; and he said, if all these points be not for the Plaintif, all is against him, and he held that the words at and from are all one as to signifie the intent of the parties. The words have here an extraordinary signification, according to time and place, and at or in a place are all one, and the word at may be satisfied with time precedent or subsequent, & quæ incontinenter fiunt inesse dicuntur, et instans est indivisibile, and he denied Berwicks case in the 5th. Report to be law. And here is no need of a forced construction; for the intent of the party appears by the case 8 rep. 91, For the second point, if the Lease be not good, and no use raised, then where the estate of the land is? And he held that it is in the Feoffees notwithstanding; for here the use is limited, but not in the cases put on the other side. And here was a fee simple determinable; but it being become impossible, it is a fee absolute. Trin. 18 Car. Roll and Bois, and Dyer 300. is mistaken in putting of the case on the other side: And it cannot result, for there is no use here to result, but the party is in by the Common Law. To the 3 point, if the use doth result, yet the estate of Hamond hinders the bargain and sale; for he is a wrong doer, because that the fee being determined by his holding over he is a wrong doer; but if not, yet his Estate is paramount. For the 4th. he held that the bargain and sale is not good upon the consideration expressed, because it is not made for monies paid nor secured to be paid. 37 Eliz. VVard and Lamberts case C. B. For the 5th. point he held, that it doth not enure as a Covenant to stand seized, because here are no words of Covenant. Boyntons case, Plow. Coment. 301. 2ly. There are plain words to shew the intent of the party to be against it, and also actions following thereupon. Foxes Case, 5 Rep. 15 Car. Pitfield and Pierce, Banc. reg. 17 Eliz. Gallards case. And whether the use ariseth or not, it matters not, if the use ariseth, Watson hath title, if not, Cumberland hath the estate, and so it is an ill feoffment, and prays judgement for the Defendant. Roll chief Iustice said, there is a variance, and it cannot be the same lease; yet it is a good lease to raise a use, because the feoffor joyns in it. Ierman Iustice to the same effect, and he held that the words at and from are all one. Nicholas Iustice doubted. Roll chief Iustice said, that it is a distinct lease; but the party hath made such a lease and more, and a feoffment made habendum a die datus, if the seisin be not made at the last instant of the day it is not good. The Court ordered it should be argued again Tuesday sevennight following. Postea.

Lease. Variance. Use. Feoffment.

Hill. 1649. Banc. super.

Arrest of Judgement in an Action upon the Stat. against engrossing Victual.

Upon an Endictment preferred 22 Car. at the Assizes in Kent against one for engrossing Apples, Pears, and Cherries, framed upon the Statute made against engrossers of Victuals, the Defendant pleaded and was found guilty, formerly judgement was arrested, and the Counsel heard. Edward Johnson of the Inner Temple prayed for Judgement for the Keepers of the liberty, &c. notwithstanding what had been objected formerly; and that upon these reasons. 1. Because that Apples, Pears and Cherries are Victuals within the Statute, and that because the Statute is not to be abridged. And the Statute of 2 Ed. 6. made concerning fruiterers expounds this Statute, that Apples and Pears, &c. are Victuals, for the Fruiterers are called sellers of Victuals; and for Bois his case that is objected that Apples are not Victual, it is not to be meant of all sorts of victual in a general acception, and without doubt engrossing of them is engrossing at the Common Law, 26 Eliz. Salt is no Victual per se, nor is used as Victual in any Country; yet it is there said to be Victual. But Apples are Victual per se, and Costermongers are called Victuallers by their Charters. Roll chief Justice said, That 4 Iac. Apples were adjudged no Victuals; and after upon a writ of Error this Judgement was affirmed in the Exchequer Chamber, and therefore that judgement is not to be lightly passed over; and if they should be adjudged Victuals, the trade of the Costermongers would be destroyed: and for Salt it is no Victual, but a preservative of Victual; and Hops was adjudged to be no Victual, 20 Iac. upon a reference made to the Judges. Neither are Apples to be accompted Victual within the Statute. Ierman Justice differed, and Nicholas Justice held, that Apples are Victual within the Statute, because they are better than Fish. Ask Justice held, that Apples are Victual, but not within the Statute, for a Statute cannot alter by reason of time, but the Common Law may. It was adjourned.

Barnwell against Graunt.

Hill. 1649 Banc. sup.

Entred Trin. 1649. rot. 791.

Error to reverse a judgement where some are found guilty, and others acquitted. Abatement. Error.

The Court was moved for their opinion in this cause, whether the writ of Error did lie or not. It was said that a writ of Error is not like another writ; for another writ may be abated for one person, and stand good to another; but if the writ of Error will not lie, it is abated in all. Hacker and Wotton Pasch. 24 Car. rot. 342. And Roll chief Justice asked the Counsel what he could say to the Books of 2 Ed. 3. and 3 Ed. 3. Privies in Record may joyn in a writ of Error, so is it here, and an inconvenience may come to all the parties by this judgement, although but some of the parties against whom the action was commenced are found guilty, and others are acquitted, and therefore they may all well joyn in the writ. And therefore let the Iudgement be reversed if cause be not shewn Wednesday next to the contrary.

Roberts

Roberts againſt Tucker.

Hill. 1649. Banc. ſup.

Paſch. 18 Car. rot. 116.

A Writ of Error was brought to reverſe a Judgement given in the Court at Bridgewater in an Action of the Caſe upon an Aſſumpſit to pay ſuch a ſum of money at the Defendants return out of Ireland. The Court held that Bridgewater hath no power to enquire of a thing done beyond their jurisdiction, and Ireland is out of their jurisdiction, whence the party upon the Aſſumpſit was to return. Latch of Councel with the Defendant in the Writ of Error ſaid, that the Writ of Error is returned by the Mayor, and Deputy Recorder, and their Letters Patents give not power to have a Deputy Recorder, and the Writ of Error is directed Maiori Aldermannis et Recordatori. The Court ordered cauſe to be ſhewn why the Writ of Error ſhould not be quaſhed. Poſtea

Error to reverſe a judgement given in an action upon an Aſſumpſit.

Juriſdiction.

Return.

quaſhed.

Poynes and Francis.

Hill. 1649. Banc. ſup.

Mich. 24 Car. rot. 222.

A Writ of Error was brought to reverſe a Judgement given in the Common Pleas, in an Action of Treſpaſs, and the Error aſsigned was, that in the poſtea there is no aſſociation to the Juſtice of Aſsize expreſſed, as ought to be. Roll Chief Iuſtice anſwered, this is the fault of the Clark of the Aſsize: Therefore let him attend and ſhew cauſe why the Poſtea ſhall not be amended.

Error to reverſe a Judgement in Treſpaſs.

Amendment.

Hill. 1649. Banc. ſup.

The Court was moved to quaſh an Endictment for a riotous entring into certain land, and carrying away 4 loads of Hay. The exception taken was that the Endictment ſaith aſportavit duo Carucat. fœni, inſtead of duo Charectat. fœni. Roll chief Iuſtice anſwered, If the party be culpable for the entry into the land, although he carried away no Hay, yet the Endictment is good, therefore plead non cul. to all the Endictment, and it may be if it prove not good in all parts it will be naught in all.

To quaſh an Endictment for a rio.

Hill. 1649. Banc. ſup.

The Caſe of the Mills of Newton and Tyd concerning the preſentments made to the Commiſsioners of Sewers for the Hundred of Wisbitch, and their order made thereupon was again ſpoken to. Twiſden againſt the preſentment ſaid, That it is not a preſentment by Jury, as it ought to be by the Statute; for the Jury have only power to enquire of things within the Hundred of Wisbitch, and it doth not appear that Newton and Tyd are within that Hundred. 2ly. The ſubſtance of the preſentment is not good; for the Commiſsioners cannot order that Newton and Tyd which have

For quaſhing preſentments, and Orders of Commiſsioners of Sewers.

have no benefit by the repairing of the bank shall contribute to the reparations, 18 E. 3. f. 22. 3ly. They cannot order to make a new wall notwithstanding Callice his opinion in his reading upon the Statute of Sewers. 4ly. The Tax is not well laid, for it is not laid upon all the Lands within Newton and Tyd, as it ought to be charged, if any ought to be. Holhead answered to this last exception, that it does not appear there are more Lands in Tyd or Newton than are charged. And Roll chief Iustice said, that is well enough. To the third exception, Holhead said it is not wholly a new work, and therefore they may order to make it. To which Roll chief Iustice assented, and said it was so notwithstanding the Case of the Ile of Ely, for that was for the making of a new work totally. To the 2d. Exception he read the words of the presentment, by which it appears, that because the adventurers had no Lands to be charged, and it is found necessary to be repaired, that therefore it is to be repaired by Newton and Tyd for the present necessity. Maynard answered, that they are not bound to repair for the Act of a Stranger. Roll chief Iustice answered, Newton & Tyd may take there remedyes against the strange adventurers, and it seems there was a present necessity to repair it for publique safety. If one be bound by prescription to repair a wall, yet to prevent the present, and publique danger, the Commissioners may tax others to do it, and the Law is just that is here made by the Commissioners. But the 1. Exception is not answered, and so the Commissioners have exceeded their authority. Therefore let their be a new Law made by consent, and quash the presentments, except better matter be shewed. But we cannot order you to have your monyes again. But for that take your remedy at Law.

Taxes.

Garret against Blisard.

Hil. 1649. Banc. sup.

Hil. 24 Car. rot 983.

Arguments upon a case upon a special verdict in an ejectione firmæ.

Forfeiture.

UPon a special verdict found in an ejectione firmæ, The Case was this, Grandmother Tenant for life, the remainder to the Father for life, the remainder to the Son for life, the Son levyes a fine come ceo, &c. of the Land, the question was whether it be a forfeiture of his estate or not. Hales argued that it was a forfeiture, but I could not here him well; He cited these books 41 Ed. 3. 1[illegible]. 24 E. 3. f. 70. Pasc. 11. Car. Banc. Reg. Huttens reports, Trin. 7 Car. Banc. Reg. and adjudged 11 Car. in King and Edwards case: Dyer 239. And he said that a fine sur conisance de droit come ceo, &c. as it is in our case, is a Feoffment upon Record, and doth imply a Livery: And said, that a remainder may be forfeited by levying such a fine, and concluded it was a forfeiture. Wadham Windham on the other side argued that it was no forfeiture; And cited Mich. 24 E. 3. and Dyer 139. and said this for a ground, that where a Feoffment in Fee made by a Tenant for life, doth displace any remainder, that such a Feoffment is a forfeiture, but it is not so in this Case, and therefore it can be no forfeiture. If Tenant for life of a rent or of an Advowson levy a fine, it is a forfeiture, although that no remainder be displaced, this is the great objection, 15 E. 4. f. 15 by Littleton, and the fine sur conisance de droit implyes a Fee simple, 40 Ed. 3. But there a Fee simple really passed with the estate for life; But here it passes by way of interest, and not by way of estopel, and the Conusee may confesse and avoid, and therefore here is no estopel, and so it differs from the Cases objected 6 Rich. 2 Estopel 211. But it is objected, that he hath taken upon him to passe all the estate; which is more than he hath to passe, and this makes it a forfeiture, 43 E. 3. f. 22.

It

It is good for the reversion in Fee, and not for the other estate, 37 H. 6. f. 5. 41 E. 3 f. 14. by Thorpe. It was answered, that he hath not taken upon him to passe all the estate, but only his own estate: It is objected, that the fine joyns all the estates together, and purports the passing of them whole and entire; It was answered, that the fine doth not purport the entire estate, 44 E. 3. f. 10. so much shall passe by the fine as may rightfully passe, and no more, and so the estate passes by fraction, Cooks Instit. 345. The Law construes the effect of the fine according to the intent of the parties, and that wrong shall not be intended so is it here; And if there be Tenant for life, the remainder in tail, the remainder in Fee to Tenant for life, if Tenant for life levie a fine it is no forfeiture, 10 H. 4. f. 2. Tenant for life may pray in aid of all in the remainder, and he said, that in this case is no forfeiture nor estopel, nor hath he passed more than he hath, & there is no wrong by the fine; but it shall only passe what may be passed, and he said, a fine is a Feoffment when the thing to passe by it lyes in Livery, otherwise it is but a grant, and devests no estate as a Feoffment doth. And in Baker and Hackers Case in this Court, Bredons Case was denyed for Law by Bramston, Jones, and Barkley, Hob. 388, 389. It is no discontinuance, and such estate shall first passe, by which no wrong shall be done. The Judges ought to be Astuti to invent reasons to support estates, and to defend from injuries, and where the Conusee of the fine hath an interest to passe by it to satisfie the operation of it, such a fine is good, and doth no wrong, as it is in our Case. It is objected, that there is a Fee simple here, but it is of no value, for it is after an estate tayl, and shall not be assets in the Heir; It was answered, It is but of little value, but it hath more than a right in it, and so he prayed judgement for the Defendant. Roll chief Justice held, it was a forfeiture although there be no displacings of estates, because it puts an estate in a stranger, who ought not to have it, as Bredons Case is, where one doth acknowledge another to have the inheritance by the fine, this is a forfeiture: By the fine here the Comsor acknowledges more to the Conusee than he hath, and he might have expressed in the fine the estate that he hath in the Land, and no more, and so there is an estate in possession here. Ierman Justice said, the fine shall not be construed to do wrong; but the Case is of consequence, therefore he would advise. Nicholas held it was no forfeiture. Ask was of the opinion of the chief justice. Roll chief Justice said estopels will make forfeitures in many Cases. Q. what Judgement was given. Forfeiture.

Meers against French.

Hil. 1649 Banc. sup.

Entred Hil. 24 Car. rot. 24.

Arrest of Judgement in an Ejectione firmæ. Declaration.

An ejectione firmæ was brought for ejecting the Plaintiff out of a rectory, and declares of a lease thereof made unto him by Indenture. The Plaintiff had a verdict, the Defendant moved in Arrest of Judgement, that the Plaintiff had declared of a lease per Indenturam, and doth not say in curia prolatam. The Court answered, if an Indenture be pleaded but by way of inducement, it is not necessary to say in curia prolatam, otherwise if it be pleaded to entitle the party by it. 2ly. He declares, that the Defendant did eject him out of such a close, and doth not say whether it was pasture or arrable land, nor how many Acres it was. Roll chief Justice said, it is not good if it be of a close of Land, if he do not give it a name, nor

declare of what nature the land is. 3ly, He declares that the Defendant ejected him de uno Crofto, which is incertain. But Roll chief Iustice said, That a Writ of Dower and an Assise will lie de uno Crofto, and so will an Ejectione firmæ, although a Formedon will not lie de uno Crofto. And therefore let the Plaintif take his Iudgement, except cause be shewed to the contrary Monday next. Postea.

Dower. &c.

Hill. 1649. Banc. sup.

Entred Trin. 24 Car. C. B rot. 1010.

Error to reverse a Iudgement in Trover & Conversion.

A Writ of Error was brought to reverse a judgement given in the Common Pleas in an Action of Trover and Conversion of divers goods, for many improper words used in the Declaration to express several of them, as 1. Argentum servitium is used to express a silver Salt-cellar, which is not good; for servitium is Latin for service: And in Parker and Martyns case in this Court, Instrumentum ferreum, anglice a Horse-lock, was held not good, and 3 Iac. Robotums case, Hama, anglice a Crow of Iron, was adjudged naught; 2ly, He declares de duobus Castoribus, anglice two Hats. 3ly, De duobus Catenis pro patinis, anglice Dishes, 4ly, De duodecem Crinalibus et plagulis, anglice Coifs and Crosscloaths. Ed. Turner prayed for Judgement notwithstanding these exceptions: Because as to the 1. there is no proper word for a silver Salt-cellar, and it is here well enough described by divers words. 2ly, There is no proper Latin word for Hats called Demy-Castors, and therefore it is lawfull to frame words, & so for the rest, being new things not known to the Romans, there are no Latin words for them, & so words may be invented well enough to express them, and servitium argenteum is here with an anglice, and therefore it is a good description of the thing: and de instrumento ligneo Composito, anglice a skreen, hath been adjudged good, because there is not a proper word to express it. But the Court doubted of the words used for Coifs and Close-clothes, because they are divers things. Jerman Iustice said, argenteum servitium, anglice, a silver Salt-cellar, cannot be good, for servitium is Latine for service. But Roll chief Iustice said, if servitium signifie nothing, then the Jury gave no damages for that, and then the rest may be good. But yet the Iudgement was ordered to be reversed, except cause shewed, and was then at the prayer of the Councel pronounced; which if it be not prayed, the Judge will not doe it, Quod nota.

Peise against Mablye.

Hill. 1649. Banc. sup.

Pasch. 1649. rot. 222.

Error to reverse a judgement in an action upon the case for words.

Case. Judgement.

A Writ of Error was brought to reverse a judgement given at Launceston in an Action of trespas upon the case, for these words, These Town weights in Georges possession (meaning the Plaintif, who was the Common weigher of the Town) are falie and cosening weights. The 1. exception was, that here was no Communication had of the Plaintif, but the words are only spoken concerning the weights. 2ly, The judgement is not well entred; for it is said to be given ad eandem Curiam, whereas it ought to be per eandem Curiam. Upon these exceptions the Iudgement was reversed.

Colson

Colson against Ree.

Hill. 1647. Banc. sup.

Hill. 24 Car. rot. 561.

A Writ of Error was brought to reverse a Judgement given in the Court at Newcastle upon Tyne, in an Assise of Novel disseisin. The Error assigned was, that the Plaintif doth declare that the Defendant did disseise him de uno muro lapideo, and that the Defendant had erected a house in the place to his nusance. The Court answered, The Plaintif ought to have brought an Assise of Nusance for this wrong, which because he hath not done, let the judgement be reversed. Error to reverse a Judgement given in an Assise. Assise of Nusance.

Batisford against Yate.

Hill. 1649. Banc. sup.

Pasc. 1649, rot. 289.

A Writ of Error was brought to reverse a judgement given in an Action of Trover and Conversion for these errors: 1. It is said of the Jurors in entring of their verdict, Dixerunt pro querente: and aly, In the awarding of the Venire it is ideo præceptum fuit, with an, &c. and so it is not certain whence the Venire issued, as it ought to be. The rule was, the judgement should be reversed, if cause were not shewn to the contrary. Error to reverse a judgement given in a Trover and Conversion. Venire.

Cooke against More.

Hill. 1649. Banc. sup.

Trin. 1649. rot. 645.

Cooke brought an Action upon the case against More upon an Assumpsit, to pay for certain barrels of beer, sold and delivered unto him such a day. The Defendant pleads specially, that he did not assume as the Plaintif hath declared. To this plea the Plaintif demurs, because that by thus pleading the Plaintif is tied up to a particular day: whereas he may give in evidence for any other barrels of beer sold at any time before the Action brought. The Court ordered cause to be shewn why the Plaintif should not have judgement upon this demurrer. Demurrer to a plea in an action upon an Assumpsit.

Banbury against Basely.

Hill. 1649. Banc. sup.

Hill. 24. Car. rot. 1062.

This case arising upon a special verdict found in an Ejectione firmæ, touching the title of the Manor of Callidowne, being part of Sir Thomas Morgans estate that was given to Mr. Pym by Ordinance of Parliament, and heretofore argued on both parts, was again spoken to: First by Twiden Pym, Argument upon the Case concerning the Manor of Callidown given to Mr.

den, who argued for the Plaintif; who said, the Question is, Whether the estate setled by Sir Thomas Morgan before the year 1641. be forfeited by the Act of Parliament, and consequently well given to Mr. Pym, or no? And he said, the intent of the Parliament in making this Act is first to be interpreted: and he held, that according to the Act no estate passeth, but such estate as Morgan had in the year 1641. and no more; for no man can forfeit a thing that he hath not, but only that which he hath; but Morgan then had not this estate: and therefore he could not forfeit it. 2ly, There is a priority of vesting the estate in the Parliament, and next from the Parliament to the Trustees, and the Trustees can have no more than is forfeited to the Parliament, and the estate setled before the year 1641. is not forfeited to the Parliament. 3ly, The penning of the Act is considerable; The Act saith all the said lands, that is all the said lands that Morgan had in the year 1641. and not all the lands that Morgan ever had before that time, and had setled; for the precedent words are restrained by the words subsequent, Altams case, 8 Rep. Dyer 369. and from the preamble of the Act to make a construction to punish innocent persons, is against the Law of God, Man, and Nature, Nichols case, f. 398. Of rewards and punishments consist the essence of Commonwealths, and it could not be the intent of the Parliament to punish innocent persons, 3 Ed. 4. 2. The Parliament did not intend to give more of Morgans estate, than what he had 1641. for then they might give that which might be evicted, which they intended not. And whereas it is objected, that there is a clause of Revocation in Morgans settlement, and so the estate was not absolutely setled; It is answered, That notwithstanding this power of Revocation, the estate is not given by this Act unto Pym; for it cannot give a power, 7 Rep. 13. and a power cannot be forfeited, and Mary Morgan had an interest in the land, notwithstanding the power of Revocation. And notwithstanding there is no saving for Mary, yet the estate is not passed; for Mary Morgan is not intended to be punished, Nichols case, Com. f. 483. and so there needs no saving for her, 14 H. 8. f. 2. and it cannot be intended because there is no saving for her, that therefore she shall forfeit her estate, and the saving is not therefore idle; for it hath an operation another way. The saving is not intended of the estate of a Collateral Ancestor only, for this is the begging of the question, for the saving saves not any thing, and the penning of the words are against this exposition; and so he concluded, that nothing was given by the Statute to Mr. Pym, but the estate of Morgan which he had in the year 1641. and prayed judgement for the Plaintif. Steel, the Recorder of London, for the Defendant, said, he would only answer the argument of Twisden, because he had heard no other arguments. And first he held, that the Ordinance reaches all the estates that Morgan had, as well before, as at the time 1641. and the estate setled by Morgan before 1641. was the estate of Thomas Morgan in the year 1641. 2ly, The lands are expresly named which are given by the Statute, & it is not material who hath the estate in them, for certitudo nominis tollit demonstrationem, Dowbry and Dudingtons case, and Mildmayes case, 1 Rep. do interpret how the word others shall be interpreted. And here cannot be said to be any injustice in the Parliament. The Question here is, Whether the estate be setled by the Parliament? and if it be setled, it would be a supposition of injustice, to suppose it is not rightly done. The Law hath invested the Parliament with a power to dispose of all lands, and therefore it cannot be intended injustice; And the estate is not in Mary Morgan notwithstanding the Conveyance, because there is a clause of Revocation in it; for it is a void Conveyance as to her estate, by reason of the clause of Revocation, for that makes it fraudulent. And the estate of Mary Morgan is not passed by the Statute, notwithstanding

ing the clause of eviction in the Ordinance, an if or an an are no saving of an estate, and here is no eviction in the case: and here is no saving, otherwise their estate cannot be saved, for then the lands are all passed, And the saving extends to the lands descended to the Children of Thomas Morgan, from Collateral Ancestors, and not from Tho. Morgan the Father; and as reasonable a Construction ought to be made of an Ordinance of Parliament as this is, as of an Act of Parliament, and so he prayd Judgement for the Defendant. Roll chief Iustice said He did not doubt of the power of the Parliament in this case, but of their meaning, whether they intended these lands should be forfeited, or not: And the Ordinance was made by the House of Commons without any proviso in it, and the proviso was put in by the House of Lords, and he enclined that Mary Morgins estate was saved. But Jerman Iustice said, he conceived that Maries estate was not saved, but only the estate of strangers. The Court was divided, and said they would consider till next Term, and then give Iudgement in this and the Case of Garret and Blizard.

Quære, What Iudgement was given in both cases, for I was not in Court at the day they were spoken to again.

Vincent against VVallis.

Hill. 1649. Banc. sup.

Hill. 24 Car. rot. 966. rot. 906.

IN a Replevin for distraining of Cattel the Defendant imparled, and afterwards pleaded that the lands are antient Demesne where the distress was taken, and to this plea the Plaintif demurred. Serjeant Parker for the Plaintif, and against the Demurrer held, that the plea is not to be admitted, because that the party hath made his defence, and cannot therefore afterwards plead to the jurisdiction of the Court, and cited 11 H. 4. f. 47. 12 H. 7. f. 17 b. That freehold only is to be sued for in antient Demesne. And 2ly, the plea is not sufficient, for it doth not appear that the lands are held of the Manor, but only are parcel of the Manor; and such lands are pleadable in other Courts, 20 H. 6. Nat. Brev. 11 M. 41 Ed. 3. 3ly, It is not said that the lande are pleadable by Writ of Droit Close, which ought to be 2 H. 7. f. 17. 3 H. 6. f. 146. 4ly. He prescribes that the lands are not pleadable elsewhere, which is not true, for in some cases they are pleadable here in this Court, Nat. Brev. 19 D. and so prayed judgement for the Plaintif. Roll chief Iustice demanded, why is there not a special demurrer here? After imparlance one may plead that the lands are antient demesne, for a plea of lands in antient Demesne to the jurisdiction of the Court differs from other pleas pleaded to the jurisdiction of the Court. It is true that parcel of a Manor of antient demesne is pleadable at the Common Law; but lands held of the Manor are pleadable in the Court of the Lord. Adjourned to be heard Tuesday following. Afterwards it was moved again, and Roll chief Iustice said, that after imparlance this plea is not good; because by it he hath admitted the jurisdiction of the Court, And therefore let him shew cause why he should not plead in chief.

A Demurrer to a plea in a replevin after imparlance.

Plea.

Special Demurrer.

Paſcall againſt Sparing.

Hill 1649. Banc. ſup.

Paſch. 1649. rot. 75.

Error to reverſe a judgement in Debt for Conceſſit ſolvere.

Declaration.

A Writ of Error was brought to reverſe a Judgement given in an Action in Briſtow upon a Conceſſit ſolvere by the Defendant. Roll chief Iuſtice ſaid, that an Action of Debt did well lie upon a Conceſſit ſolvere by the cuſtom of Briſtow, and ſo is it in London, 28 H. 6. 1 E. 4. f. 6. Another Error aſsigned was, that it is ſaid that the party recovered the damages per juratores Compert. whereas it ought to be Aſſeſſ. for this is the proper word; but this exception was alſo over-ruled. Latch took another exception, that there wants the words pro miſis et cuſtagiis in the aſſeſsing the damages; and ſo it doth not appear for what the damages are aſſeſſed. And for this the Iudgement was reverſed except better matter ſhewn.

Damages.

Iennings againſt Lee.

Hill. 1649. Banc. ſup. *Ante 150. Le*

Whether an iſſue well joyned.

GEnnings brought an Action of Treſpas of an aſſault and battery againſt Lee and his wife; for an aſſault and battery made by the wife, the Feme pleads a ſpecial plea of juſtification, that it was in defence of her Husband: The Plaintif replies de injuria ſua propria, upon this there was an iſſue joyned, and a verdict for the Plaintif; it was moved in Arreſt of Judgement that the iſſue was not well joyned, becauſe the replication was not good, and ſo the verdict not good, and ſo there can be no Judgement. Serjeant Parker prays judgement for the Plaintif, for he held the replication was good, and ſo a good Iſſue joyned, and if there be not, yet it is helped by the Verdict, or elſe by the Statute of Jeofails, or if not, yet it is at leaſt good in part. And the iſſue here doth imply a negative, although there be not a direct negative, but an affirmative in the words of it. And 6 E. 4, 16 b. in a Replevin, and 9 H. 5. f. 1. b. there are good iſſues joyned in the affirmative, becauſe they imply a negative. Trin. 18 Jac. Banc. reg. Aldridge and Walthalls caſe: and here wants only a Traverſe; which is but only matter of form, and not material. 2ly. The Verdict hath made the iſſue good, although it be not well joyned, 5 H. 7. f. 15. 3ly. If the Verdict helps it not, yet the Statute of Jeofails helps it, 5 Rep. Nichols caſe, 19 Eliz. Dalliſons Reports, 8 & 9 Eliz. Bendloes Reports, and 14 Car. Banc. Reg. 4ly. If the Statute help not, yet it is well enough, becauſe it is good in part, and for part it is well found, and damages ſhall be intended to be given for that which is well found, 9 H. 7. f. 4. 16 H. 7. f. 16. 10 Rep. James and Osburns caſe, 3 Iac. Banc. Reg. Bigrane and Selling, Mich. 1649. Deſmond & Osborn (this caſe the Court denied.) Roll chief Iuſtice ſaid, if there be 2 iſſues, and one iſſue is not well joyned, and damages be given entire, this is not good, but will make all naught, 40 Ed. 3. f. 40. 18 Iac. Aldridges caſe. 16 Iac. Iones and Gates adjudged, and he ſaid that the material thing is not here put in iſſue, and ſo the iſſue is immaterial, and there is a Jeofail, and the damages being given entire there can be no judgement given. Jerman Iuſtice did differ in opinion, and ſaid, if the Defendant plead an immaterial thing, and the Plaintif joyn iſſue, and it be found for him, he ſhall have judgement; otherwiſe where the plea is partly material, partly immaterial; for there the iſſue ought to be upon the material

Iſſue.

Damages.

Iſſue.

Je fail.

rial thing, otherwise there can be no judgement. It was adjourned till Thursday following.

The Case was this, An Action of Assault and Battery and wounding was brought; the Defendant pleads non cul. to the wounding, and justifies the Assault and Battery in defence of her Husband, in keeping possession of certain lands. The Plaintif replied de injuria sua propria, and doth not traverse absque tali causa. The Jury find entire damages for all, whereas there is not a perfect issue joyned as to the Assault and Battery for want of the Traverse. Postea. *&c.*

Hodges against Jane.

Hill. 1649. Banc. sup.

In an Arrest of Judgement in this case, the question was, Whether an Action do lie against an Executor upon a Concessit solvere of the Testator upon a special custom. Roll chief Justice held that it doth not, for this would be to charge an Executor in an Action of Debt, where he may by the Law wage his Law, and an Action of Debt lies not against an Executor upon a simple contract made by the Testator. And he said that the reason for Ley gager is, because it is intended that as well as the contract to pay money may be in private, so may also the payment be made in private. Adjourned.

Whether debt lie against an Executor sur concessit solv. of the Testator.
Wager of Law.
Debt.
Executer.

Graves against Drake.

Hill. 1649. Banc. sup.

In an Action of Trover and Conversion for divers parcels of Houshold stuff, an Exception was taken to the Declaration, because the Plaintif amongst other things had declared pro sex parcellis plumbi cinerii Anglice Pewter Porringers: whereas the word parcellis is uncertain; for a parcel doth consist of many things in number, and so sex parcelli cannot be properly applyed to six Porringers, but if it had been sex peciis it had been better, though that be also incertain. Hales held it was all one as if it had been pro sex peciis plumbi Cinerii. Roll chief Justice enclined it was well enough, because, though the words are not so proper, yet the description is good enough. Ierman Justice was of the same opinion. But Nicholas Justice held that the Latin is not good, for if there be proper words for a thing, they ought to be used, otherwise Barbarism will be induced; and circumlocution ought not to be used where there is a proper Latin word to be had to express a thing. Ask Justice agreed with Roll the chief Justice: And the Plaintif was bid take his Judgement, except better matter were shewn to the contrary.

Arrest of Judgement in a Trover and Conversion.
Declaration; Words.

Hobson against Hudson.

Hil. 1649 Banc. sup.

Hobson brought an Action upon the case against Hudson for speaking these words of her, viz. She went to the Wells to be cured of the French Pox. Upon Not guilty pleaded, and a verdict found for the Plaintif, the Defendant moved in Arrest of Judgement, that the words are not actionable,

Arrest of Judgement in an Action for words.

nable, because they are incertain words, and doe not expresse that the Plaintif had the French Pox at the time of the speaking of them, and the causa dicendi shall not make them actionable. Shastoe on the other side said the words are actionable; for these words thou hast been laid of the Pox, have been adjudged actionable, which are not so scandalous as these, Mich. 7 Iac. Thou art a Pocky whore, and the Pox hath eaten out the bottom of thy belly, were held actionable. Roll chief Iustice said the words required consideration; but the words seem to imply that the party did believe that she had the French Pox, else she would not have gone to be cured, and so they are scandalous. Ierman Iustice said, intentions shall not make words actionable, and therefore he conceived they are not actionable. Nicholas Iustice said, he conceived them prima facie to be actionable, for words shall be taken according to the common intendment, and an Action on the Case may sometimes be brought upon words spoken by implication and interrogation. Ask Iustice held they were actionable. But the Court said they would advise. Postea.

Case.

Hill. 1649. Banc. sup.

For quashing an Endictment.

The Court was moved for the quashing an Endictment, for suffering one to escape that was taken for Felony; But the Court would not quash it though there was cause, but ordered the Defendant should plead to it, because they believed he had compounded with the Felon.

VVyat against Harbye.

Hil. 1649. Banc. sup.

Mich. 1649 rot. 426.

Error to reverse a Judgment in Debt at Barnestable.

A Writ of Error was brought to reverse a Judgement given in the Court at Barnestable in an Action of Debt upon an Obligation. The Error assigned was, that the place alleged for the payment of the mony, sued for is out of the jurisdiction of the Court. It was answered, that it is said to be at Chitlehampton aforesaid, and it doth not appear whether Chitlehampton be within the jurisdiction of the Court, or where it is, and therefore it shall be intended to be within the jurisdiction. Roll chief Iustice said, the Declaration is, that the Obligation was at Barnestable, and the plea is that it was at Chichley which is a forein plea, and the plea is not sworn, neither is there any demurrer upon the plea; but the plea is received, and day given to swear it, and for not swearing it accordingly, a judgement is given against the Plaintiff by default, whereas it ought to have been a Judgement upon a nihil dicit for want of a plea, and he said also, that if one plead an insufficient plea, although it be a forein plea, it is not necessary it should be sworn. The Iudgement was ordered to be reversed, except cause shewed to the contrary.

Iudgement.

Forein plea.

Jones

Iones against Blunden.

Hil. 1649. Banc. sup.

Mich. 1649. rot. 34.

A Writ of Error was brought to reverse a Judgement given in the palace Court at Westminster in an Action of Assault and Battery. The Case was this, an Action was brought for an Assault and Battery in Surry; The Defendant pleads a plea of justification in Middlesex: The Plaintiff replyed that he beat him in Southwark, (which is in Surry) de injuria sua propria absque tali causa, and this issue was tryed by a Jury of Midlesex. The question was whether it were a good tryal. The Court would advise. Postea. *206*

Error to reverse a Judgement given in the palace Court at Westminster. Tryall.

VVatson against Norbury and others.

Hil. 1649 Banc. sup.

VVAtson brought an Action upon the Case against Norbury a Commissioner upon the Statute of Bankrupt and others, for the breaking of his house, and taking away his goods upon pretence of the said Commission, whereas he was no Bankrupt, by reason whereof he was empaired in his credit, and hindred in his Trade, and declares to his damage, &c. The Defendant pleads that the Plaintiff had heretofore brought an Action of Trespasse against him for the same trespasse, and goods taken, and had recovered damages against him. To this plea the Plaintiff demurred; And upon the demurrer the question was whether this plea pleaded by the Defendant be a good plea in abatement of the writ of Trespasse, upon the Case now brought, or not? Shafto of Counsel with the Plaintiff argued that the plea was not good, because the matter in this Action upon the Case, and the matter of the former Action of Trespasse are not all one; but are several and various matters, and therefore severall Actions may be brought for them, 5. rep. f. 43. Sparies case, Hob. 493. The Earl of Bedfords case, 4. rep. Slades case, Petty Brook 105. 4. rep. f. 43. Hudsons case, 11 Ed. 2. Fitzh. Trespasse 107. 2 R. 3. f. 14. 18 E. 4. f. 23. 20 H. 7. f. 9. 12 E. 4. f. 13. Fitzh. estopel 58. 7 H. 4. f. 44. And the variances here between the Action upon the Case, and the Action of Trespass prove that they are not all one: And that there is a difference it is plain; for in this Action upon the Case, it is said that the Defendant did enter into the Plaintiffs house malitiose; but in the former Action of Trespass it was said, that he did enter vi et armis, which is a plain difference and variance, 8 H. 6. f. 27. Cooks Entries fol. 59. And the matters pleaded upon Record in these several Actions do not destroy one another; but may well stand together, Pasc. 2 Car. Laicon and Barnards case: And here this Action of the Case is to repair the Plaintiffs credit; but the former Action was to recover damages, for his goods taken from him. An abduxit of Cattel will maintain a chasing, and one may therein recover for the chasing, and the value also, so here both Actions may stand together. And there is matter for both Actions, and the matter pleaded in Bar is but to encrease the damages, and if the special matter alleged in the Action of Trespasse alleged in the Action upon the Case had been lesse, yet it is well enough, and it is but surplusage, and only by way of inducement to prove

Demurrer to a plea in Trespasse upon the Case.

Abatement.

the ſcandal, and the Defendant here is not at any miſchief, for the words here are only put in aggravation of dammages, 7 H. 6. f. 34. and ſo prayes judgement for the Plaintiff. Green of Councell with the Defendant prayed the Writ might be abated. Becauſe 1. here is not any thing ſaid, that the Defendant hath poſitively affirmed the Plaintiff to be a Bankrupt. 2ly. There are general words in the former Action, namely alia enormia, which words do comprehend the matter for which this Action is now brought, and he denyed the differences taken by the Councell on the other ſide. And it doth here appear to the Court, that the former Action of Treſpaſſe was brought for the ſame things, and damages were therein given for them, and it is unreaſonable to puniſh one twice for one and the ſame offence, and the averment is good, and doth ſhew that both Actions are for one and the ſame cauſe, and he hath recovered damages already for all the wrong he ſuſtained, and here is no converſion alleged in the Caſe, nor is it vi et armis, and the Law hates double veration, 9 H. 6. f. 54. Brook brev. 397. 3 H. 7. 4. Brook brev. 77. and damages might well enough be recovered in the firſt Action, for all the damages ſuſtained, 19 H. 6. f. 44. And if this Action now brought, had been brought for calling the Plaintiff Bankrupt, the Action would have lien; but not as it is here brought, and one entire Action ſhall never be divided to put the party to a double veration, as it is in our caſe, 41 Aſſ. pl. 16. Brook brev. 309. 5. rep. Hudſons caſe, and in the firſt Action the words alia enormia were purpoſely put in, that all matters touching that Treſpaſs might be brought in queſtion, to encreaſe the damages, 9 E 4. Brook Treſp. f. 109. and ſo all the damages were recovered in the former Action. And he agreed Laicons caſe put by Shafto, that the Plaintiff might recover damages as well for the value of the Sheep, as for the chaſing of them, and prayes the Writ may be abated. Roll chief Iuſtice ſaid, it is hard to maintain Laicons caſe; for cepit et abduxit intends that the owner hath not the Sheep again, otherwiſe it would be if the Action had been for the driving of them only. And Mr. Shafto hath taken a good ground, viz. that the Actions are for ſeverall things, and the Declaration is in part but an inducement to increaſe the ſcandall, and to prove it, and the words alia enormia ſhall not be intended of collateral matter, but of matter incident to the Act done: And one and the ſame thing may give ſeveral cauſes of Action, and one Action is not to be confounded with another Action. Ierman Iuſtice ſaid, Laicons Caſe was not like this Caſe for the queſtion here is whether the Plaintiff can recover damages in this ſecond Action, which he hath by intendment recovered in the former Action, and he inclined that it may be ſo here, and that there is a recovering of the ſame damages in divers manners for the ſame thing. Nicholas Iuſtice ſaid, he may bring ſeverall Actions, although he might have joyned them both in one. Aſk Iuſtice ſaid, That one Act may be divided into divers Actions, and ſo it is here, and well enough. Roll chief Iuſtice ſaid, the Plaintiff in this Action cannot recover damages for his Goods, ſo that this Action is brought for another matter. Therefore plead in chief if cauſe be not ſhewed to the contrary, for the Action doth well lye.

Meers againſt French.

Hil. 1649. Banc. Reg.

Arreſt of judgement in an ejectione firmæ.

IN an ejectione firmæ, and a verdict for the Plaintiff, The Defendant moved in arreſt of Judgement, that there is no certainty in the Declaration

tion neither of the place nor of the quantity, nor of the quality of the Land whence the Plaintiff was ejected, for it is e duobus Acris fundi, Anglice, a hopground, which is not warranted by the Latin, and so it is incertain, and it is also dimisit unum croftum, and a peice of Land, and the quantity is not expressed, for it is per estimationem sive plus sive minus, & medietatem sive unam partem is also incertain. Twisden answered, it was certain enough, because it is expressed by a certain name. But Roll chief Justice said, it is good in grants; but not in a Declaration: for there is required more certainty, and the Anglice here doth not help it, for the Anglice is not to interpret a Latin name by which it is called. And the sive plus sive minus is also ill; but if it had been so many Acres per estimationem, it had been good. Therefore advise better of it. Antea. Declaration. Grant.

Vaux and Vaux against Draper.

Hill. 1649. Banc. sup.

Entred Trin. 1649. rot. 1104.

VAux and Vaux brought an Action upon the Case against Draper, upon a promise, and declared, that the Defendant in consideration of ten pounds paid by the Plaintiffs unto the Defendant, did assume and promise unto the Plaintiffs, to procure certain Cattel of the Plaintiffs taken from them by a third person, to be redelivered unto them by such a time, and for not performing this promise they brought their action. Upon Non assumpsit pleaded, there was an issue joyned, and a verdict found for the Plaintiffs, after this case had been twice spoken unto, The Defendant moved in arrest of Judgment, that this Action was not well brought joyntly by the Plaintiffs, but that they ought to have brought two several Actions, in regard that the promise upon which the Action was founded was not an entire promise, but was a several promise made to each of the Plaintiffs. The Counsel on the other side prayed for Judgement, and said the promise was intire, made to both, and not several, and so the Jury have found it, which shall be intended to be true: and if it should not be so, it would be disadvantagious for the Defendant. Hales said on the other side, that the assumpsit is several, and the acts to be done by the Defendant to the Plaintiffs are several, although the assumpsit sounds as a joynt assumpsit. Roll chief Justice said, That the Consideration given is entire and cannot be divided, and there is no inconvenience in joyning in the Action in this case; but if one had brought the Action alone, it might have been questionable. Nicholas and Ask Justices of the same opinion. But Jerman Justice differed, and said, that they are several promises, viz. to deliver such Cattel severally to each of them, as did belong properly to them, and so there must be two several Actions. But Judgement was given for the Plaintif, except better matter shewed. Antea. Arrest of judgement in an action upon the case, upon a promise. Joynt action.

Spry against Mill.

Hill. 1649. Banc. sup.

Pasch. 1649. rot. 208.

IN a Writ of Error brought to reverse a Judgement given in a Trover and Conversion at Launceston in Cornwal, upon a nihil dicit, Prestwood moved Error to reverse a judgement in a trover and conversion.

Abatement.

moved, that the record is not certified; for it is returned by one who is not Judge there; for it is returned by the Maior, Aldermen, and Deputy-recorder, whereas the writ of Error was to return a record before the Maior, Aldermen, and Recorder, 1 E. 5. f. 3. Jordan and Tompkins case, 1648. Upon this the writ of Error was abated.

Wats against Dix.

Hill. 1649. Banc. sup.

Trin. 24. Car. rot. 1529.

Argument whether a lease well made according to direction of a Deed in trust.

THis case was again argued, by Hales for the Plaintif, and by Twisden for the Defendant. I could not hear Hales but imperfectly; Therefore I omit his Argument. Twisden, that argued for the Defendant, put the case briefly thus. A Feofment was made of lands to I. S. in fee, until he should make a lease of 21 years to A. B. from the feast of Philip and Iacob; I. S. makes a lease for 21 years, to begin at the feast of Philip and Iacob, And he held this was a good Lease, made according to the direction of the Deed. 2ly, If it be not a good Lease, yet the use shall not revert to the Feoffor. 3ly, He held that there is neither a good bargain and sale, nor doth it work by way of use. For the first point he held, if it had been by way of pleading, it had not been good in pursuance of the Agreement: otherwise it is being found by verdict; but here the agreement and the intention of the parties is satisfied, and the variance is not considerable, & de minimis non curat lex, 10 Iac. Hob. f. 120. 38 E. 3. f. 7. Waste 35. 2ly, In the Judgement and estimation of men, at and from are accompted to be all one in signification. In the Stat. of 32 H. 8. it is so taken, and in the Stat. of 27 H. 8. of enrollments, and words shall be construed according to common intendment. And if there be a variance, yet the use rests in the Feoffees, and shall not revert to the Feoffor: for the word until, is an Adverb of time, Borastons case; Sir Andrew Corbets case, 11 Rep. f. 85. Dyer 300. 3 Eliz. Mores Reports, 3 Iac. Sir Guy Fairfax case: if they make not the estate, the estate remains in them. And if it do not remain in the Feoffees, yet it cannot revert to the Feoffor, for he hath conveyed from himself all the estate that he had, and if it return to the Feoffor, it is a disseisin, 2 Rep. Butlers case; And for the bargain and sale, that cannot be good; for here is no Consideration, but that which is past, and not continuing, which is no good Consideration, Plow. Com. 302. 15 Car. Burton and Sherly. 2ly, The Consideration, if there be any, is not meritorious, for ought any thing appears, the monies may not be discharged which are laid out, and so the Defendant remains unsatisfied; and so there can be no Consideration, Allens case, 23 Car. 3ly, If the debt be discharged, yet it cannot raise a use, for here is no monies, paid but a debt; And a use is not raised here, because it was the intent of the parties to pass the land by way of bargain and sale, Ed. Foxes case, 13 Eliz. Plowd. 32. 11 Car. Whitfield and Pierce, rot. 438. And if one intend to pass an estate out of himself, he may do it either by the Common law or by Statute law. Roll chief Iustice said, if lands are passed for money only, the deed ought to be enrolled; but if it be for money and natural affection, it is not needfull to enroll it, but the lands will pass without enrolment. And so here the land passes one way or other; and if the use will rise all the other points are out of doores. And there is here a continuing consideration to raise a use. But the main question is whether the use riseth to the Feoffor, if not, all the other points are gone. And he held

Enrollment. Vse.

that

that here was only a meer matter of trust, & the intent is not that the Feoffees shall have any thing by the not performing the trust, but the use shall be to the Feoffor. And there can be no disseisin in the case. And here is a material difference in point of law, in the making of this lease, for it is made for one day more then was agreed by the deed, for that lease was to begin from the feast of Philip and Iacob; and this lease is made to be begin at the Feast of Philip and Iacob. Jerman Iustice held, that the intent of the parties is performed, and that there is no material difference, and held for the Defendant. Nicholas Iustice said, here is no performance of the agreement, for all the parties agreed not to this Lease, for it is made for longer time than was agreed; and he held that the use shall be to the other parties by contingency, and that here is no disseisin. Ask Iustice said, all the difficulty is whether the lease be made or not; and he held it was a good lease according to the agreement, and said that the intent is not that the Feoffees shall have any thing, but that it shall result to the Feoffor. Roll chief Iustice said, the intent of the parties shall not be implyed against the direct rules of Law. Nil capiat per Billam nisi, &c. Lease. Intent.

Pendarvis against Dawkes.

Hill. 1649. Banc. reg.

PEndarvis brought an Action of Accompt against Dawkes for divers sums of mony as his receiver The Defendant pleads that as to all except ten pounds ne unques receptor; upon this an issue was joyned, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgement, that it doth not appear what ten pounds they are that are mentioned in the plea; and so it is uncertain whether they be part of the monies, for which the Action is brought, Roll chief Iustice said, he ought to have expressed what ten pounds it is, for as it is, it is uncertain, and so not good. Therefore take a venire facias de novo, for though the issue be not well joyned, yet the Declaration is good. Arrest of Iudgement in Accompt. Venire de novo.

Cowley against Lecton.

Hill. 1649. Banc. reg.

Trin. 24 Car. rot. 932.

IN a writ of Error to reverse a judgement given in an Action of Debt upon an Obligation the case was this. One was bound in an Obligation (for the payment of certain sums of money) to a Feme sole, the Feme takes Baron and dies. I. S. takes out Letters of Administration of the goods and Chattels of the Feme, and brings an Action of Debt upon the Obligation against the Obligor. The Obligor pleads that by the entermariage of the Feme the Debt due upon the Obligation became due to the Baron, and demands Judgement Si Actio, To this Plea the Plaintif demurs. The Court said this Debt due upon the bond became not due to the Husband, for it is a thing in Action, and therefore the plea is not good. Writ of Error to reverse a Iudgement in Debt. Chose in Action.

Iones against Blunden.

Hill. 1649. Banc. sup.

Mich 1649. rot. 34.

Whether a good tryal or no.

THis Case formerly spoken to was again moved by Wild, who held, that in regard that the matter triable ariseth from two places, and so the venire may be from both places; yet it is well enough if it be from any of them, and the Court hath jurisdiction in both places, and therefore the tryal is well enough in this case. Twisden on the other side said, that here are two issues in tryal, and so it is not within the Statute of Jeofails; for that is of force only where one issue is tryed. Roll chief Iustice answered, here are not two issues, for you have made them one by pleading, and so it is within the Statute of Jeofails, and helped by it. Ierman Justice to the same intent: and so Nicholas and Ask Iustices. Roll chief Iustice said, that the issue is joyned upon the matter arising in both places, and yet it is well enough; for the principal matter was in St. Clements Danes. Therefore let the judgement be affirmed, except better matter be shewn. Antea.

Issue. Jeofails.

Adstone against Hunter.

Hill. 1469. Banc. sup.

Arrest of Iudgement in an Action on the Case.

ADston brought an Action upon the case against Hunter and his Wife for these words spoken of the Plaintif by Hunters wife, viz. Jane Adstone did bewitch my good man, innuendo her Husband. Upon Not guilty pleaded, and a Verdict found for the Plaintif, it was moved in Arrest of judgement that the words were too general, and uncertain, to raise any scandal, and therefore an Action could not be brought for speaking of them. Shaftoe of Counsel with the Plaintif held that the words are actionable, because they declare an Act or thing done, and the party is scandalized by the words, 4 rep. Ieames his case, and the words my good man are words well known to express her Husband by, as 7 Iac. to say, Thou art a healer of Felons, was well understood to mean a Concealer of Felons; and if the words good man be uncertain, yet they are certain enough to shew that some body is bewitched, for the Act done is certainly enough expressed, and the Plaintif is thereby scandalized, and besides it is after a Verdict, and by it they are made certain, and damages are given for speaking them, Mich. 15 Car. Com. Banc. Stones case rot. 26. Roll chief Iustice said, These words, Thou hast bewitched a man are actionable, & it is a scandal to say, One hath killed a man by Witchcraft, and he held the words actionable. Ierman Iustice said, they could not be actionable, because by them there is no act of witchcraft expressed. Nicholas Iustice said, the words are not actionable for thou hast bewitched one may be spoken in a good sence, & words are but wind, & spoken in passion sometimes, and other times in Jest or merriment. Ask Iustice said, that the words tend to scandal as they are spoken, and shall be intended that she hath bewitched one by Diabolical Art. And Roll chief Iustice said, It is not necessary to aver what Act of Witch-craft was done. And these words, Thou hast bewitched me and my Aunt have been adjudged Actionable in this Court. It was adjourned to be argued again the next term.

Case.

Averment.

Hill.

Hill. 1649. Banc sup.

To quash an Order of a private Sessions of Peace.

The Court was moved to quash an Order of a private Sessions of the peace, that was removed hither by Certiorari. The Order was, that one should contribute to half the charge towards the keeping of a Bastard Child, because he did suffer a Souldier to get the Child upon the body of his Maid servant. The Court said this was not within the Statute of 18 Eliz. and therefore let the Order be quashed.

Hill. 1649. Banc, super.

For a prohibition to the Admiralty.

A Prohibition to the Court of the Admiralty was prayed for Binckes a Clark of this Court for libelling against him there for prosecuting a matter at the Common Law, which they pretend to belong to their Court, and for granting an injunction against him to stop his proceedings. The Court answered there is no libel here, this is but a citation to appear, and is no Injunction against him; but because upon the citation there appeared to be matter of Prohibition contained in it, A Prohibition was granted.

Saunderson against Raisin.

Hill. 1649. Banc. sup.

To amend a Record after Errors assigned.

Amendment.

Upon a rule to shew cause why a Judgement should not be reversed, the Court was moved that the Roll wherein the Error assigned was might be amended according to the Original which is right, though the Nisi prius Roll be not so. Holhead on the other side prayed there might be no amendment, but the Judgment reversed, for if Judgement be given upon an erroneous Declaration, which is the ground of the Action, as it is here, it is not good, nor is amendable. The Court answered, this is the fault of the Clark, who had the original before him, which is the ground of all, and by which he ought to form the Declaration. But the matter is that here it is after a Verdict, and it will be perillous to attaint the Jury, though it being the Clarks fault, it be amendable. But let it rest till the next term, and in the mean time we will advise.

Williamson against Mead.

Hill. 1649. Banc. sup.

Mich. 1649. rot. 428.

Arrest of Judgement in an action upon an Assumpsit.

Williamson brought an Action upon the Case against Meade, and declared upon three Assumpsits made by the Defendant to the Plaintif, that the Defendants son should pay such a sum of money to the Plaintif for his boarding with him, when he should be thereunto required; upon non Assumpsit pleaded, and a verdict for the Plaintif, the Defendant moved in Arrest of Judgement. That the Plaintif doth not shew that he did require the Son to pay the sum of money, which the Defendant did assume should be paid upon request; but only saith that the Defendant licet sæpius requisitus non solvit. The Judgement was arrested till cause should be shewn to the contrary. The same day it was moved again, and the Councel urged

Request. urged that the request was not necessary to be made, and prayed for judgement. But Roll Chief Iustice answered, that this was a collateral promise, and therefore the request must be averred to be made to the Son. Therefore the Plaintif can have no judgement, and so nil capiat per billam was ruled to be entred.

Hudson.

Hill. 1649. Banc. sup.

For time to assign Errors. THe Court was moved that there was a scire facias issued out to certifie Errors, and time was desired to assign them. But the Court answered, the bringing of the writ of Error is delay enough; and therefore if you have not assigned the Errors according the rules of the Court, they shall not be now accepted.

Dewick against Bamber.

Hill. 1649. Banc. sup.

That an Attorney might be forced to plead. Plea. Appearance. THe Court was moved upon an Affidavit that the Defendant might plead and goe to tryal, because his Attorney hath appeared; and now he saith he is not an Attorney of this Court, and doth refuse to plead. Roll chief Iustice answered, If he hath appeared, and yet will not plead, enter your judgement against this Clyent, and though he have not appeared, if he did promise to appear we will force him to doe it

VVhitchurch against Pagot.

Hill. 1649. Banc. sup.

To be restored to a Clerks place in the Custos Brevium Office. Restitution. THe Court was moved in the behalf of Whitchurch a Clerk of this Court, that he might be restored to his Office in the Office of the Custos brevium, according to an Order of this Court, otherwise that he may have liberty to bring his Action against the Custos brevium. The Court answered, that the Master of the Office is answerable for all his Clerks, and hath power over them, and they are not Officers but mere Servants, and therefore there is no remedy to be had in Law against him, but in Conscience he ought to restore him. Therefore let him shew cause next Term why he should not be restored.

In Michaelmas Term 1654. After divers motions and hearing what was objected on both sides, upon his submission in Court to Mr. Paget the Master of the Office he promised to restore him.

Mich 1649. Banc. sup.

Arrest of Iudgement for pleading per Guardianum. THe Court was moved in Arrest of Judgement that the Plaintif was 19 years old, and sued per guardianum, which ought not to be; for after he is 17 years years old he ought to sue per Attornatum suum. The Court answered, this is no good exception, for if he be within the age of 21 years, he may sue per guardianum, and he is admitted by the Court to doe so. And therefore let the Plaintif take his Iudgement.

Big-

Bigford against *Topsam*.

Pasc. 1649. Banc. sup.

Mich. 1649 rot. 85.

A Writ of Error was brought to reverse a Judgement given in an Action of Debt upon an obligation with the condition for the payment of a certain sum of money after the return of the Ship, to the Port of Plymouth. The Defendant pleaded a special plea, to which the Plaintiff demurred, upon this demurrer the Judgement was given for the Plaintiff, upon which Judgement the writ of Error was brought. Wadham Windham assigned for error, 1. That there issued a pone out of the Court of Plymouth, returnable the 1 of March, and the Defendant did not appear till the 8 of March, and so there is a discontinuance. Hales of Councell on the other side, answered, that the Plaintiff had accepted of a Declaration, and so that fault is helped. The Court answered, the acceptance of the Declaration doth not help it: But the Record is not so, therefore passes ouster. A 2d. Exception was, that there is no bail taken, for it is erroneous bail, and so shall be accompted no bail. The Court answered, this is not material here. A 3d. Exception was, that it is said that the plea was held before the then Major, and doth not shew that he was elected. The Court answered, it is well enough as it is, though it might have been otherwise. It was adjourned.

Error to reverse a judgment in debt.

Discontinuance.

Bail.

Custodes Libertat. &c. against *Mountain* and Lydal.

Pasc. 1649. Banc. sup.

AN information was exhibited by the Attorney generall against the Defendants for engrossing divers Acres of Corn. They pleaded that they had been heretofore prosecuted in the Court of the Exchequer, and were acquitted thereof. To this plea the Attorney general demurred, and these reasons were shewed why the plea was not good. 1. It is not pleaded that they were acquitted by judgement, or upon a verdict, or upon a former information exhibited against them. 2ly. It doth not appear that the Exchequer had jurisdiction of the cause. 3ly. There could be no information duly exhibited, for it is said to be the 10. of September, which is out of the Term, and so the Court did not sit. 2ly. there is no issue joyned, for the Plaintiff saith, ponit se, &c whereas it being by way of recital, ought to have been posuit se, and the other saith, petit quod inquiratur per patriam. 3ly. There is no verdict in the Case, for the issue is non culp. contra Statutum, and the verdict is non est culp. juxta Statutum. 4ly. There is no judgment, for it is eat ad præsens, and it ought to be iret ad tunc. 5ly. There is no averment, that the first information was for the same offence. 6ly. The information ought to be in the same County, by the Statute of 21 Jac. and the Barons of the Exchequer are not Judges by the Statute. and so prayes Judgement against the Defendant. Hales of Councell with the Defendant answered to the third exception. That in the Exchequer there is a Court the 10. of September to receive informations, although it be out of the Term time. And he said there is a good issue joyned, and a good verdict, for the words juxta et contra in this place have one and the same sence.

Demurrer to a plea to an information for engrossing

And the Judgement is also good. And the information was well brought in the Exchequer, notwithstanding the Statute of 21 Jac. for the offence was in Midlesex where the Exchequer is. Also if the Judgement be not good by reason of Error, yet it shall be accompted good, till it be avoided by plea: And although it be erroneous, yet here is a discontinuance; for Mich. 24 Car. St. John was chief Justice of the Commons Pleas, and not solliciter, as the plea supposeth. The Court answered, that they cannot take notice of that: And here is no issue joyned, nor any continuance to part of the plea pleaded by the Defendant, and the demurrer goes not to the plea, upon which the party puts himself upon the Country, and there is no demurrer to that. The demurrer is referred to the last plea, and not to all, and so there is a discontinuance to part, and the first Judgement is not void, untill it be avoided by plea, and here the fact was done in the County where the Exchequer is, and so the Barons are Judges of it by the Statute, and a fine that is voideable is not void, untill it be made so by pleading. And if you cannot answer the discontinuance, all the rest is to no purpose, therefore take time to answer that. It was said also by the Court, that the Defendant may remove an information exhibited against him, out of any County to the Courts at Westminster, notwithstanding the Statute.

Void and voideable.
Discontinuance.
Certiorari.

Hamond against Kingsmill.

Pasc. 1649. Banc. sup.

Arrest of in an action for words.

HAmond a Justice of peace brought an Action upon the Case against Kingsmill, for speaking these several words of him, viz. Mr Hamond did of his own head put into Mores confession that he stole the Lambs. And alij. That he was a debauched man, and is not fit to be a Justice of Peace. Upon not guilty pleaded, and a verdict for the Plaintiff, The Defendant moved in Arrest of Judgement that none of the words were actionable, or at least the last words are not, and so Judgement cannot be given. For the first words he said, they ought to be taken in mitiori sensu, and they may have a good construction, viz. that he framed the confession without being helped by any other body. And for the second words that he was a debanched man they cannot touch his office at the present, Mich. 24, & 25. Eliz. C. Banc. 1. because they are spoken in the preterperfect tence, and not in the present tence. The Court said that the words, was a debauched man, are incertain words. Therefore take Judgement for the first words, and nil capiat per billam for the second, except cause shewed to the contrary.

Iennings against Lee.

Pasc. 1649. Banc. sup. *Ants 150, 198. J.C.*

For a repleader because an immaterial issue joyned.

IEnnings brought an Action of Assault and Battery against Lee, The Defendant pleaded non cul. to the Battery, and pleaded a special justification as to the Assault. It was prayed there might be a repleader granted, because the issue joyned is immaterial. The Council on the other side prayed for Judgement. Wild held, that there is an Issue joyned, for the Record saith so, and the Jury have found the Issue, and if it be ill, it is not helped by the Statute, and so there can be no Judgement. All issues are not joyned by an expresse affirmative, and an expresse negative, for if it be but by implication it is good enough. An immaterial Issue is not helped

helped by the Statute; but an informall issue is helped, and here the issue is immaterial, 32 Eliz. Lovelace and Griffin, rot. 934. Trin. 22 Car. Coles case, rot. 932 Banc. Reg. 23 Car. More and Clipson, and prayes for a repleader. Serjeant Parker on the other side said, the cases cited were not to the purpose as to the Case at the Bar, for here is a good issue joyned to one thing pleaded, if not to the rest. Roll chief Iustice held, that where there is an immaterial issue, there ought to be a Repleader, and it is not helped by the Statute, and there can be no Judgment, for the matter is not putin tryal, and for this cause, it would be unreasonable to give Judgement, and this is an immaterial issue, Trin. 9 Car. entred Mich. 8 Car. rot. 366. Tayler and Sparks, an affirmative and an implyed negative make a good issue; though it be not an express negative. Therefore replead. Repleader. Ieofail. Issue.

Hurd against Lenthall.

Hill. 1649. Banc. sup.

Entred Mich. 1649. rot. 568.

VPon a special verdict in an ejectione firmæ, The Case upon the words of a Will was this, Lands were devised to two daughters equally to be divided, and to the Survivor of them, and to the Heirs of the Body of the Survivor of them. Maynard held that here is a joyntenancy, because otherwise the Will cannot take effect in all parts. Hales held that there is a tenancy in Common, and not a joyntenancy, nor any crosse remainders. Roll Chief Iustice said, That the words equally to be divided in a Will, do make a tenancy in Common by construction, but in a grant it would be otherwise; but here upon the entire Will it doth not appear that the Lands should be divided; but that there should be a Survivor. And the Land was intended for a security for a portion, and that the devise should stand till the monyes should be paid. And in a Will the last words of it do explain the first words; but it is not so in a grant. All the Iudges agreed in opinion with the chief Iustice, and Iudgement was given for the Plaintiff nisi causa, &c. Question upon the words of a will whether a joyntenancy or a tenancy in Common. Ioyntenant. Tenant in common. Will. Grant.

Pasc. 1649. Banc. sup.

THe Court was moved for a Certiorari, to the Lord Maiors Court of the City of London to remove an information exhibited in that Court, against a Woodmonger of London, grounded upon an Act of Common Councell. The Court answered, we cannot do any thing in it, if it should be removed hither, if it be grounded upon an act of Common Councel; but if the Act of Common Councell be against Law, we may grant a Certiorari. Adjourned till Friday next to hear Councell on both sides. For a certiorari to the Lord Maiors court. of London. Certiorari.

Lamb against Duff.

Pasc. 1649. Banc. sup.

VPon an Affidavit the Court was informed that Lamb had arrested Duff after a verdict found for Lamb against him, to the intent, that he may have him in Custody, when the Judgement is entred against him, and for For false practice.

for no other cause, as appears by his own confession, & it was therefore prayed the party may be set at large. The Court made answer, that this was a strange and an irregular course, and ought not to be. If one take out a latitat against one, and have no cause of Action against him, the party may have an Action of the Case for it. Take an attachment if he will not discharge the party, or else let him shew cause to morrow why he should not discharge him.

Case.

Attachment.

Hollingworth against VVhetstone.

Pas. 1649. Banc. sup.

HOllingworth brought an Action of Debt upon a single obligation against Whetstone, The Defendant pleaded payment of part of the sum, since the Action brought, in Bar of the Action. To this Plea the Plaintif demurred. The Court answered the plea was not good in Bar of the Action; but in abatement of the Writ it had been good. Therefore let the Defendant shew cause why Iudgement should not be against him upon the demurrer.

Demurrer to a plea in debt upon a single obligation.

Bar.

Abatement.

Gibbon against Kent.

Pasch. 1649. Banc. sup.

Pasch. 24 Car. rot. 60.

A Writ of Error was brought to reverse a Judgement given in the Common Pleas, in an Action of Debt brought upon the Statute of 2 Ed. 6. for the not setting forth of Tithes. The Errors assigned were, 1. That it doth not appear that the Lands towed do lye in the Parish that is laid in the Declaration. 2ly. The Plaintiff hath not intitled himself well to his Action, for the Statute of 38 H. 8. is taken away by the Statute of 13 Eliz. 3ly. The Statute is not well pleaded, for it is pleaded too generally, and not in the several circumstances thereof, as it ought to be. The Court commanded the Record to be read, and upon Oyer of it, answered, That 2 Churches united by the Statute, are both of spiritual promotion. And the Statute of 12 Eliz doth not repeal the Statute of 38 H. 8. But let the party shew cause why the Iudgement should not be reversed, and let us see a book.

Error to reverse a judgement in debt upon the Statute of 2 Ed. 6

Repeal.

Burton against Low.

Pasc. 1649. Banc. sup.

Mich. 1649. rot. 27.

AN Action of Debt was brought upon a Bond taken by a Sheriff, for the Defendant to appear in Chancery upon an Attatchment issued out thence against him. The Defendant pleads the Statute of 23 H. 6. That the Sheriff ought not to take Bonds of any, but in speciall cases, and that this Bond is void, because it is taken against the Statute. To this plea the Plaintiff demurred. The question was whether an Attatchment out of the Chancery, be within the Statute of 23 H. 6.

Demurrer to a plea in debt upon a Sheriffs Bond.

The

The Court ordered cauſe to be ſhewn why Iudgement ſhould not be given for the Plaintif upon this Demurrer. Poſtea.

Edwards againſt Fallowes.

Paſch. 1649. Banc. ſup.

EDwards brought an Action upon the Caſe againſt Fallowes for ſpeaking of theſe words of him, viz. Edwards hath ſtollen my Axe from my Wood Pen, and for cauſing him to be bound over to the Quarter-Seſſion. It was moved in Arreſt of Iudgement that the words were not Actionable. But the Court held they were actionable, and gave Iudgement for the Plaintif, Niſi cauſa, &c. Arreſt of Iudgement in an Action for words.

Viccarye againſt Barns.

Paſch. 1649. Banc. ſup.

rot. 1724.

VIccarye, being a Parcel by his Trade, brought an Action upon the Caſe againſt Barns for ſpeaking theſe words of him, viz. Thou art a Cuckold, and a Cuckoldly Raſcall, and doſt owe more than thou art worth, and art not able to pay thy debts: Upon non culp. pleaded, and an iſſue joyned, and a verdict found for the Plaintif, it was moved in Arreſt of Iudgement, that the words are not actionable; for, for the firſt part of the words they are clearly not actionable, and for the latter words they do not imply any ſhifting fraud or falſhood, and ſo cannot imply him to be a Bankrupt; for though he doe owe more than he is worth, and is not able to pay his debts, yet he may be an honeſt man, and he may have credit and friends to ſupport him in his trade. Apes and More, Paſch. 15 Car. and Iones and Iacob, 14 Car. The Court anſwered, here is no fraud or deceipt implyed, which do make a Bankrupt within all the Statutes touching Bankrupts; and if there be a ſpecial loſs alleged, the words will be actionable, otherwiſe not. But let Iudgement ſtay till the other ſide move, and bring us a book, for the words are worthy conſideration. Poſtea. Arreſt of Iudgement for words. Bankrupt.

Barneſtone againſt Gale.

Paſch. 1649. Banc. ſup.

AN Action of Treſpaſs was brought for chaſing of the Plaintifs Hogs; the Defendant by way of juſtification pleads a ſpecial plea, viz. That he did hunt them with a Dog by the command of his Maſter, becauſe the Plaintif did put them into his Maſters ground to eat the Acorns there. The Plaintif replyed that he had Common there: Upon this an Iſſue was joyned, and a Verdict found for the Plaintif. The Defendant moved in Arreſt of Iudgement upon this exception, that the Plaintif in his replication hath not anſwered the bar, for he preſcribes only for Common of Paſture, and pannage is no paſture, and ſo he hath no right to the Acorns. But Roll chief Iuſtice ſaid, If they have cauſe to eat the Graſs, they may alſo eat the Acorns there, for they may be on the grounds, and therefore it is a good juſtification. And therefore let the Plaintif have Iudgement, except cauſe be ſhewn to the contrary. Arreſt of Iudgement in Treſpaſs. Replication.

Bolton against VVills.

Pasch. 1649. Banc. sup.

Arrest of Judgement in an Action upon the Case upon an Assumpsit.

AN Action upon the Case was brought upon an indebitatus Assumpsit for a hundred and ninety Weathers sold by the Plaintif unto the Defendant at 18 s. a Sheep, which in all amounts to 190 l. Upon an Issue joyned, and a Verdict for the Plaintif, It was moved in Arrest of Judgement that the Declaration is not good, but mistakes the promise, for the Weathers promised to be paid for, do not amount to the sum for which the Declaration is laid. And also the issue is taken upon the immaterial part of the plea, and the matter well pleaded is waived. The Court answered, That mistaking of a Judgement is a mistake of the Clark, and is not material; but here the Declaration it self is mistaken, and that is material; for the Action is grounded upon the promise in Law, upon the sale of the Sheep, and not upon any new Contract, and by the sale there wants 2 s. in every Sheep to make up the sum demanded, therefore the Declaration is repugnant. Nil capiat per billam, nisi, &c.

Amendment.

Declaration.

More against the Earl Rivers.

Pasch. 1649 Banc. sup.

Mich. 1649. rot. 588.

Argument against the plea of Peerage.

VVIlson of Council with More the Plaintif, argued against the Plea of Peerage pleaded by the Earl Rivers, as it is pleaded, and took these Exceptions. 1. It appears not here by the Return by what Warrant the Earl was committed, and brought hither, and so he hath no day in Court, and so the Plea is not good. 2ly. It is not shewed by virtue of what Warrant he was taken. 3ly. The Plea is, 1. In abatement of the writ. 2ly. In avoidance of the Act of the Judge, and the latter ought not to be questioned by Plea. 3ly. There is no Plea, but bare words, for he pleads the Common-Law. 4ly. He pleads his Patent as Earl, only by way of Argument. 5ly. He ought to shew the writ under the Seal, testifying the matter, 8 H. 6. f. 9. 6ly. The investiture of the Earldom is the livery and seisin of the Earldom, and he hath omitted the pleading the Ceremonies of the investing, and so he doth not shew that he is an Earl. By the Statute Law, viz. of E. 3. a Capias was given in debt, and before that a Summons was the process. The Counsel on the other side said they had demurred to the Plea, and shewed the cause of their Demurrer; but the Court reproved them, because they had ruled the matter in Law should be argued at the Bar to enform their own Judgements. Adjournatur Postea.

Capias.

Summons.

Syms against VVilson.

Pasch. 1649. Banc. sup.

Pasch. 23 Car. rot. 120.

Demurrer to a Plea in Bar in an Action upon the case.

SYms brought an action upon the Case upon the Statute of Monopolies against Wilson. The Defendant pleaded the Statute of limitations of Actions

Actions in Bar of the Action to this Plea, the Plaintif demurred. Hales held that this action grounded upon the Statute is not within the Statute of limitations of Actions of 21 Iac. because it is not a meer Action on the Case at the Common Law, but an Action upon the Case grounded upon the Statute of Monopolies. But Twisden on the other side said that a Monopoly is an offence at the Common Law, for which an Action of the Case did lie before the Statute, and that the Statute was made but to inflict a greater punishment for the offence, and so it is within the Statute of limitations of Actions. And 2ly. the very words of the Statute say, that all Actions shall be brought within six years, and he that says all without limitation, excludes none, and by consequence this Action is not excluded. 3ly. The end of the Statute of limitations was to quiet sales, and therefore the Statute shall be largely interpreted, because made for so publique a good. Adjourned to the next term to be argued again.

Monopoly.

Statute of limitations.

Pasch. 1649. Banc. sup.

Upon a verdict given against a Hundred, that was sued in an Action upon the Statute of Winchester of Hue and Cries, It was moved for the Hundred in Arrest of Judgement, that the Hundred was sued by Bill, whereas it ought to have been sued by Original. But the Court over-ruled the Exception, and said that there are many Presidents to prove that such Actions may be commenced as well by Bill as by Original.

Arrest of Judgement in an Action upon the Statute of Winchester.

Bill.

Original.

Pasch. 1649. Banc. sup.

Letchmore moved to quash an Inquisition taken against one upon the Statute of West. 2. for the throwing down of Enclosures. But the Court answered, that it was not proper to move to quash the Inquisition, because the Defendant came in upon process, and therefore he must either traverse or plead to the Inquisition. Letchmore replyed, that the Inquisition was so uncertain, that the Defendant could not tell how to plead to it. But the Court answered, he might plead to the Distringas, And that the monies already levied for the offence should rest in the Sheriffs hand until the tryal.

To quash an Inquisition denied.

Plea.

Traverse.

Hamond against Ireland.

Pasch. 1649. Banc. sup.

Hill. 1649. rot. 818.

Upon a Verdict given in an Ejectione firmæ, It was moved in Arrest of Judgement, that the Plaintif declares that the Defendant ejected him ex uno Cottagio, whereas an Ejectione firmæ lies not of a Cottage, no more than a præcipe quod reddat lies of a Cottage. But the Court answered, that an ejectment doth lie of a Cottage, because the description of the thing by that name is sufficient and certain enough to shew the Sheriff what to deliver the possession of; yet it was said that a recovery lies not of a Cottage. Rethorick and Chapels case 10 Iac. was cited that an Ejectione lies of a Cottage, and also a præcipe quod reddat.

Arrest of Judgement in an Ejectione firmæ.

Ejectment.

Recovery.

Wood

VVood against Topham.

Pasch. 1649. Banc. sup.

Arrest of Judgement in an action upon the case.

VVOod brought an Action upon the Case against Topham, quare filium suum & hæredem rapuit et maritavit, and obteined a Verdict against the Defendant. In Arrest of judgement moved for the Defendant, these exceptions were taken against the Declaration. 1. That it doth not say hæredem apparentem, but only filium & hæredem. 2ly. It doth not say rapuit contra voluntatem, but only rapuit. 3ly. It doth not set forth that the heir was within age. 4ly. It doth not say Cujus maritagium ad ipsum pertinet. But the last Exception only was insisted upon. Wilmot of Counsel with the Plaintif, to prove that that Exception was not material, cited one Grayes case Pasch. 29 Eliz. Banc. reg. and the Books of 12 H. 4. f. 16. and 23 E. 3. Brook Tit. Trespass 43. But Hales urged that the last Exception

Case.

was not answered. Roll chief Justice said, That an Action quare filium & hæredem suum rapuit will lie, although the heir be of full age; for the Father hath the marriage of his Son although he have no estate to leave unto him. Adjourned to the next Term. Postea.

Dawkes versus Payton.

Pasch. 1469. Banc. sup.

Pasch 1650. rot. 306.

Error brought in the Upper Bench upon a Judgement given there.

AN Infant brought an Action in this Court, and had a Verdict and a Judgement, the Defendant brought a writ of Error in the same Court to reverse this judgement, and it was assigned for Error that the Infant brought his Action in propria persona, whereas he ought to have sued per guardianum, and this is Error at the Common Law, and is not helped by the Statute of Jeofails; and it was argued that the writ of Error may be well brought in this Court to reverse a judgement given here, if the Error assigned be matter in fact, as it is in this case, for by such a writ of Error the judgement of the Court is not called in question, as it

Error.

would be if the Error assigned were matter in Law; and these Books were cited, viz. 7 H. 6. 28. Dyer 136. Mich. 25, & 26. Eliz. Banc. reg. Hales on the other side argued that the writ of Error did not lie. And he made 2 questions, 1. Whether the writ of Error did lie at all. 2ly. If it did lie in an other Term; and he said, that admitting the writ of Error doth lie, yet it ought to have been brought the same Term wherein the judgement was given; but so it is not here, and therefore it is not well brought: And 2ly. If the Error assigned be Error, yet it is helped by the Statute of 21 Jac. of Jeofails. But if it be not, yet the Error assigned here is not assignable; for it doth not appear whether the party appeared per guardianum or not, for the party is a privileged person. The Court answered, we cannot know whether the party be within age or of full age, and therefore know not whether he ought to appear by Attorny or by Guardian; but for Error in matter of fact, in a judgement given in this Court, a writ of Error will lie here well enough, and it is all one whether the writ be brought the same Term, or in another Term. But bring us Books and we will advise. Postea.

Viccarye

Viccarye againſt Barnes.

Paſch. 1650. Banc. ſup.

AN Action upon the caſe was brought by a Mercer againſt the Defendant, for ſpeaking theſe words of him, Thou art a Cuckoid, and a Cuckoldly Raſcal, and art not able to pay thy debts, and art not worth a Groat. The Plaintif had a Verdict, and upon a motion in Arreſt of judgement, becauſe the words were ſuppoſed not actionable, the judgement was formerly ſtayed till the Plaintif ſhould move. At this day Pepes for the Plaintif prays for judgement, becauſe he held the words were actionable, and cited one Bragges Caſe, adjudged, and ſaid that the Plaintif had laid a ſpecial damage by the words. Windham on the other ſide ſaid, That the Plaintif had not laid any ſpecial damage as Pepes ſuppoſeth, but only allegeth a general damage, namely, that he by ſpeaking of the words loſt his credit, and could not buy wares upon truſt as he uſed to do before, but only for ready money, and ſo there can be no iſſue joyned. Ierman Juſtice held the words actionable, and alſo Roll the chief Juſtice, for he ſaid it was a hinderance to him in his Trade to be ſo ſpoken of, although they bring him not within the Statute of Bankrupt, and he cited 11 Car. Jackſon and Hewes his caſe, where an Action was brought by Jackſon being a Grazier, againſt Hewes, for ſaying of him Thou art a baſe beggarly Rogue, and art not able to pay thy debts. Nicholas Juſtice held the words actionable, but Ask Juſtice doubted, for ſuch words may peradventure be true, if they be ſpoken of a young Tradeſman that begins with little, And ſaid that the chief queſtion is whether the averment of the damage be well alleged; and he held it was not, becauſe it was ſo general that no iſſue can be joyned upon it. Roll chief Juſtice ſaid, the words are found by the Verdict to be ſpoke falſo et malitioſe, And therefore let the Plaintif have his Judgement except better matter be ſhewed.

Arreſt of Judgement in an Action upon the Caſe for words.

Paſch. 1650. Banc. ſup.

AN Information was exhibited in this Court againſt one for engroſsing of Hay, the Defendant appeared and pleaded to the information, the Plaintif moved that the Defendant might be ordered to carry the cauſe down to be tryed at the Aſsizes at his own charge. But the Court anſwered that they could make no ſuch Order, becauſe the ſute was not upon an Endictment, which is at the ſute of the Cuſtodes, but upon an information, which is at the ſute of the party.

For the Defendant to try an Information at his own charge denied.

Indictment.

Information.

Cater againſt Startute.

Trin. 1650. Banc. ſup.

Hill. 1649. rot. 1025.

THe Plaintif brought an Action of Debt upon an Obligation to ſtand to an award: The Defendant pleaded that there was no award made; The Plaintif replies that there was an award made, and ſets forth the award, and aſsigns the breach; Upon this the Defendant demurs, and for cauſe ſhews that part of the award was, that one of the parties ſhould

Demurrer to a replication in debt upon an Obligation to ſtand to an award.

make such a general release to the other as Councel should advise, so that the Councel are made Arbitrators, in regard that a judicial act is referred to them, which ought not to be; for the Arbitrators cannot delegate their authority to others, and 8 E. 4. f. 10 was cited to this purpose. But Wild on the other side said, that the referring of the making of the releases to Councel was warrantable, because it is but a ministerial act, and not a judicial, as is objected. Roll chief Iustice said, that there is no judicial thing left for the Councel to do, but only a ministerial act, and therefore it is well enough; but it had been otherwise had it been a judicial act, for that had been for the Arbitrators to delegate their authority to others, which is not warrantable, because it is contrary to the submission of the parties, but to delegate a ministerial act is not contrary; And with him the Court agreed, and ordered the Plaintif to take his Iudgement, except better matter were shewn Saturday next.

Minister-ial. Act Judicial.

Dawkes against Payton.

Trin. 1650. Banc. sup.

Pasch. 1650. rot. 306.

Error to reverse a judgement in the Upper Bench upon an issue directed out of the Chancerie.

AN Action was ordered out of the Chancery to be tryed in this Court; Whereupon the cause was tryed, and a Iudgement upon a Verdict was given for the Plaintif. The Defendant brings a writ of Error here to reverse this judgement. The first question was, whether it did sufficiently appear by the Record, whether the party did appear in person or by Guardian. Hales held that it did not appear, but that it belongs to the other party to shew it; for he ought to have all the Record upon which the Error is assigned. A second question was, Whether the Error assigned, if it be Error, be not helped after a Verdict by the Statute of 21 Iac. Hales held, that however the party appeared, whether by Guardian, or in proper person, it is helped by the Statute of 21 Iac. and cannot be assigned here for Error, and the writ of Error that is brought is as well to reverse the judgement given here, as the former judgement given in Chancery, which cannot be, for this Court cannot reverse their own Judgement, except it be for Error in process, 17 H. 6. 2. 44 7 H. 6. f. 28. nor can this Court reverse their own judgement for Error in fact, because it is to overthrow their own act, yet the Chequer chamber may doe it; yet there it is more proper to appeal to the Parliament; and he said, that the Cases of 2 Rich. 3. f. 1. and Dyer 175. cited, to be resolved, have been since disputed, and so prayed the writ of Error might abate. Roll chief Iustice said, that for the first matter, whether it appears by the assignment of the party, whether the appearance were per Guardianum, or otherwise, we will not imagin either Attorney or Guardian in the Case, but that he appeared in propria persona, because nothing to the contrary appears by the Record, and if it be otherwise you ought to have shewn it. And for the matter, whether it be Error to appear by Attorney, where the party ought to appear by his Guardian, he held it was Error, and that it is not helped by the Statute of 21 Iac. because it is more dangerous for an Infant to appear in propria persona, or per Guardianum, than per Attornatum; for against an Attorney he may have remedy, but not against himself or his Guardian; and this is casus omissus out of the Statute. And as to the question, whether this Court may reverse their own judgement, he held, that they may for Error in matter of fact, as the case here is, though they cannot for Error in matter in Law, as was adjudged, Mich. 25. rot. 96, and Mich. 5 Jac. in Watkins and Giffins case, and if it should not be so

Appearance.

Error.

Casus omissus

so here, the party would be without remedy, for he can have no remedy in the Chequer Chamber, and there is no president in Parliament be to relieved there, and it is neither against reason nor any Rule of Law for this Court to do it. Upon this the Counsel moved to quash the writ of Error upon an exception taken to it, as it was entred in the Record, but because it was but a mis-entry, the writ it self being right, the Record was ordered to be amended by the Writ. Amendment.

Roberrs and Tucker.

Trin. 1650 Banc. sup.

Pasch 18. Car. rot. 116.

THe Court was moved to quash a writ of Error, because the writ was to remove a Record coram Majori et Recordatori, whereas the Record certified was a Record coram Majori et Deputato recordatori. Roll chief Justice, the Record is not well removed, why may you not have a new Certificate upon the same writ? But that cannot be, and therefore you must have a special writ directed to remove the Record before the Mayor and the Deputy Recorder; for if there be a special cause to alter the usual form of a writ, the Curitors ought not to hold themselves to the old presidents, but are compellable to alter them if the case require. Therefore let the writ be abated, and take another Writ. Vid. antea. To quash a Writ of Error. Alteration. Abatement.

Shertlife against Tymberlye.

Trin. 1650. Banc. sup.

Hill. 1649. rot. 438.

SHertlife brought an Action of Debt against Tymberlye upon an Obligation, the condition whereof was, that the Defendant should save the Plaintif harmless from such a person, & should release unto him all his right in certain goods: The Defendant pleads that he had saved the Plaintif harmless, and had released unto him all his right in the goods, and to this plea the Plaintif demurred, and shews for cause that the Defendant ought to have shewed how he had saved the Plaintif harmless, because the condition was in the affirmative. To which the Court agreed, because he might have pleaded generally in the negative, viz. non damnificatus, and that had been good, and therefore judgement was given against the Defendant. Demurrer to a Plea in debt upon an Obligation to save harmless. Non damnificatus.

Hobson against Hudson.

Trin. 1650. Banc. sup.

HObson brought an Action upon the Case against Hudson for these words, Thou wentest to the Wells to be cured of the Pox: The Plaintif had a Verdict against the Defendant, who moved in Arrest of Judgement that the words were not actionable, because they were too general and uncertain. But Roll chief Iustice, and Nicholas and Ask Iustices held they were actionable. But Ierman Iustice doubted, because the party that went to the Wells to be cured might suspect he had the Pox though Arrest of Judgement in an Action for words.

he had them not, But Judgement was given for the Plaintiff.

Elsy against Mawdit.

Trin. 1650. Banc. sup.

Pasc. 1650. rot. 409.

Arrest of judgement in an action for words.

ELsye brought an Action upon the case against Mawdit for speaking these words of him; Thou Sirrah art a rogue and a run-away rogue, and didst run away from Oxford, and art a rogue upon Record at Oxford. The Plaintiff upon not guilty pleaded had a verdict, the Defendant moved in arrest of Judgement that the words were general, and uncertain, and not actionable the Court thereupon stayed Judgement till the Plaintiff should move. The Plaintiff at another day moves by, Hales of his Councell for Judgement, who said that the words are actionable, or at least some of them, for thou art a rogue upon Record are actionable words, and that is part of the words. The Court enclined also that they were actionable, yet would advise. Postea. The same Term Judgement was given for the Plaintiff.

Chase and Iones against Lovering.

Trin. 1650. Banc. sup.

Arrest of judgement in an action upon the case upon a promise.

Averment.

CHase and Iones brought an Action upon the case against Lovering, upon a promise made by the Defendant to the Plaintiffs to pay unto them 84 l. out of the fraight of a Ship, and for not paying it the Plaintiffs bring their Action. Upon non assumpsit pleaded there was an issue joyned, and a verdict found for the Plaintiffs. The Defendant moved in arrest of Judgement, & alleged for cause, that the Plaintiffs averment in their Declaration of the non payment of the 84 l. is not good, for it doth not appear by the averment that there was any fraight due for the Ship, out of which the monies were to be paid. Roll chief Iustice answered, that the Plaintiff ought to have averred that there were monies due for the fraight of the Ship, otherwise how can it be known whether there be any monyes due to be paid out of them, therefore the averment is very uncertain, to whom Iermin Nicholas and Ask Iustices agreed. Roll Chief Iustice added, that it is part of the promise that the mony shall be paid out of the fraight, and as the averment is; the matter cannot stand together, and here is no demand for the monyes to be paid out of the fraight. Therefore against the Plaintiff let there be a nil capiat per billam entred.

Blackden against Harvye.

Trin. 1650. Banc. sup.

Hill. 1649. rot. 928.

Demurrer upon a plea after imparlance.

BLackden brought an Action upon the Case, upon an indebitatus assumpsit to pay unto him 9 l upon delivery of certain Cloath against Harvy as Executor of I. S. The Defendant appeared and imparled; and after imparlance pleads in abatement of the Writ, that I. S. made other Executors

cutors together with the Defendant, who ought to have been named in the Writ. The Plaintiff demurs, and for cause shews, 1. That the Plaintiff doth not shew what goods the Defendant administred, nor at what time he administred any, as he ought, and 6. Iac Edwards and Foyes case was cited to prove it. A second cause of the demurrer was, that the plea in abatement of the Writ is after imparlance, which is not good, because it is touching a thing in the Defendants knowlege, and so he might have pleaded it before imparlance, as it is 35 H. 6. f. 36. Ierman Iustice absente Roll answered, that the first exception is not material; but he held that the second was a good exception, and that the Defendant cannot plead in abatement after imparlance, for by his imparlance he hath admitted the Writ good. Therefore plead in chief if cause be not shewed to the contrary on Friday next. Abatement.

VVinter against Barnard.

Trin. 1650. Banc. up.

VVInter brought an Action upon the Case against Barnard, and declared, that upon the rumor that a Bastard Child was drowned. The Defendant said to the Plaintiff, I do verily believe the Bastard Child was thine, nay it was thine; upon not guilty pleaded an issue was joyned, and a verdict found for the Plaintiff: It was moved in arrest of Judgment that the words are not actionable, as they are laid for that it doth not appear that there was a Bastard Child drowned, for the Declaration is that there was only a rumor, that a Bastard Child was drowned. But all the Court agreed, that by the conference set forth in the Declaration, it is agreed that there was a Bastard Child, and it is a scandal to the party, whether there were a Bastard Child or no, and if there were none, you ought to shew it on the Defendants part. Therefore let the Plaintiff have his Iudgement. Arrest of judgement in an action for words.

Elsy against Mawdit.

Trin. 1650. Banc. sup.

Pasc. 1650. rot. 409.

THe Case of Elsy and Maw dit was again moved, wherein the Plaintiff had a verdict against the Defendant, in an Action upon the Case brought against him, for speaking these words of him; Thou Sirrah art a rogue, and a run-away rogue, and didst run away at Oxford, and art a rogue upon Record at Oxford; upon a motion in arrest of Judgement, Judgement was staied till the Plaintiff should move. Hales now moved for Judgement, because the words are actionable, for they make the Plaintiff to be such a Rogue as may be endicted within the Statute, and receive corporal punishment; But Twisden denyed it. Roll chief Iustice held it was within the Statute. Yet the Court would advise. In this case Ierman Iustice said, That if one say that another is forsworn in a Court of Record, the words are not actionable; but if he say that he is forsworn upon Record, the words are actionable. But Roll chief Iustice held there was no difference between the words, but that they are both Actionable. Antea et Postea. Arrest of judgement in an action for words.

More againſt the Earl Rivers.

Trin. 1650. Banc. ſup.

Mich. 1649, rot. 588.

Earl Rivers caſe touching privilege of peerage.

MOre Arreſted the Earl Rivers by a bill of Midleſex in a plea of Debt, The Earl was therupon brought before Mr. Iuſtice Nicholas to put in bail, and not being able to put in ſufficient bail according to the courſe of the Court, was committed to the cuſtody of the Mareſchal of the Marſhalſea, the Earl being in cuſtody brings himſelf into Court by a habeas corpus, and there pleads his priviledge of his peerage, and ſayes, that he ought not to be arreſted, and demands Judgement of the Writ, and prayes to be delivered; to this the Plaintiff demurred. Hales of Councel with the Earl argued to divers points, but I could not here him well. But the main queſtion he inſiſted upon was, whether that by taking away the houſe of Lords in Parliament, whereby their voice and place in Parliament was gone, the Priviledge of his peerage not to be arreſted for Debt, was alſo taken away,

Capias.

and he argued that it was not, for he ſaid, that at the Common Law, no capias did lye againſt a Peer, and the Statute of E. 3. which gave a capias for Debt againſt others, did not give it againſt a Peer, and it doth appear here that the Defendant is really an Earl, and not in nomination only, and he cited 27 H. 8. f. 22. The reaſons he ſaid why an Earl had the priviledge not to be arreſted, are two. The firſt is in reſpect of the dignity of his perſon, being called comes a comitando rege (as ſome have thought,) and he is called by the King conſanguineus noſter. The ſecond is in reſpect of the preſumption of his ſufficiency of eſtate in lands to be ſummoned by, and not by reaſon of his place in Parliament, for they have the priviledge not to be arreſted, as well in the vacancy of Parliaments, as when the Parliament doth ſit, and the priviledge of Parliament is that he ſhall not be ſued; but the priviledge of peerage is, that he ſhall not be arreſted in his perſon, and ſo they are diſtinct priviledges, and by taking away the Lords houſe, the former priviledge is taken away, but not the latter, and this priviledge (annexed to the perſon) not to be arreſted, may belong to a perſon that hath not the priviledge of Parliament, as for example unto Widowes of Peers which could not be arreſted, and yet had no place in Parliament, ſo that the excluding them from the Parliament doth only take away their priviledge of Parliament, and not their priviledge of peerage, and Nevills caſe is, that the priviledge not to be arreſted belongs to them in reſpect of the dignity of their perſons, 9 Rep. Salops caſe. And it hath been a queſtion whether comes be ſo called a comitando rege, or in reſpect of their Counties whereof they were Earls, and I conceive the latter derivation is the truer, and then the taking away the King takes not away their priviledge, for the Counties remain. 2ly. Earls have by intendment ſufficient freehold to enforce them to come in, and anſwer at this day, and therefore are not to be arreſted, and impriſonment of a mans perſon for debt, was but a ſuppliment to make him anſwer where he had not ſufficient freehold, which we cannot intend here, Nat. brev. f. 93. And an Earl ſhall be amerced higher than another man, in regard of the preſumption of his freehold, and Earls are called majores Barones in this reſpect, 7 E. 4 Nevils caſe, and the widow of an Earl had the priviledge not to be arreſted, for the two very reaſons that her husband had it, ſo was it of a

Biſhop

Bishop, Abbot, and Prior of England; but otherwise it was of a Bishop that had a Bishoprick out of England. And the late Statute that takes away the Kingly office doth not take away their names, and dignities, nor the presumption that they have freeholds, and therefore they are not to be arrested, and their will be since the Act, no more a failer of right than there was before, and so he prayed the Writ might be abated. Roll chief Justice answered, your Client ought to have prayed the Writ might have abated, before he was turned over to the Marshall of this Court, for then he was in Midlesex where he was arrested; but now it is too late, for now he is in custodia Marescalli, and any body that hath cause of Action against him may declare against him. Jerman Justice said, that the Writ is now determined, which you pray to have abated, so your prayer is to no purpose. Roll chief Justice said, that the dignity of the person of an Earl may relate to him as he is Peer of the Parliament, and the other presumption that he hath sufficient freehold may also fail; but it doth not appear here by averment that he hath not freehold, therefore it may be a question whether there shall be intended a failer of Justice, for want of freehold, if the party should not have been arrested, and he agreed that an Earl as a Peer of Parliament had a double privilege, one of his person to be free from arrests, the other of his Estate to be free from suites, and he said, if it had appeared by averment that the party had freehold, it had been good without doubt to free him from arrests. Jerman Justice said he is now in custodia, and the Declaration against him is good, and now it is too late to claim his privilege. Nicholas in all points was against the privilege. Roll chief Justice asked, what say you to them that have Declarations on the by against the Earl, for certainly they are good whether he be rightly committed or not, for they are not to examine his commitment, and therefore surely it is now too late to speak in abatement of the Writ.

Abatement.

Declaration.

Arrests.

Declaration.

Nayler against Ash.

Trin. 1050. Banc. sup.

Hill. 23 Car. rot. 611.

NAyler brought an Action upon the Statute of 5 Eliz. against Ash in this Court for using the Trade of a Draper, and upon not guilty pleaded there was an issue joyned, and a verdict found for the Plaintiff. The Defendant moved in arrest of Judgement, and took two exceptions to the Plaintiffs Declaration. 1. That the Statute doth not name the trade. 2. That it being a popular Action, it ought to have been brought in the County where the offence was committed, and not in this Court. To the 1. Exception the Councell on the Plaintiffs side answered, that the trade is comprised in the meaning of the Statute, because it was a trade used at the time of the making of the Statute. And to the second he answered, that notwithstanding that the original processe issued out of this Court, yet the tryal thereupon was in the County where the offence was done, and the remedy that the Statute intends, is made use of by the tryal being in the County where the offence was done. Roll chief Justice answered, we directed you to search for presidents, but you have not done it. But I conceive the Statute is not satisfied, for it says that the party shall not be compelled to appear out of the County, and here he is compelled, and this is not helped by the verdict, to which the Court agreed.

Arrest of judgement in an action upon the Statute of 5 El. for using the trade of a Draper.

Appearance.

Ernely.

Ernely against Allen.

Trin. 1650. Banc. sup.

Mich. 1649. rot. 351.

Error to reverse a judgement in a Trover and Conversion.

ERnely brought an Action of Trover and conversion against Allen, for taking away, and converting to his own use divers of his goods, and Chattels, and amongst others he declares for the Trover and Conversion de ducentis ponderibus, anglice waight, medicamenti, anglice drugs; the Plaintiff had a verdict, and a Judgement, and entire damages given for all the things laid in the Declaration. The Defendant brought a Writ of error to reverse this Judgement, and assigns for Error, that the words de ducentis ponderibus, anglice waight, medicamenti, anglice drugs, mentioned in the Declaration are incertain, and so the damages being given intire for all, it was not good. Wadham Windham of Councell with the Plaintiff in the Writ of Error, held the words to be incertain, both in respect of quantity, as also in respect of the quality or nature of the drugs, for the word pondus may signifie a pound, an ounce, a dram, a scruple, or any other waight, so that the waight cannot be known. And the anglice waight is as incertain as the Latin word pound, for waight may signifie as many different waights as the Latin word pondus may; But it might have been otherwise, if it had been anglice a stone, or a weigh, which were words certainly known what they mean; but here a waight of drugs is not understood by the Druggsters. And for the words they shall not be said to be void, so that there are no damages given for them, for the words are not like to the words duodecem duodena fili, for they are adjective words; but the words here are substantive, and signifie by themselves. And the word medicamentum also is as incertain as the other words, and the anglice drugs doth not make it more certain, for a drug is of as an incertain signification as the word medicamentum, for all vegetable creatures, and extractions out of them, as also out of the living creatures, made use of in physick, either by themselves, or else compounded one with another, are called drugs, and so he prayed the Judgement might be reversed. Maynard on the other side said, that the words joyned with the anglice were certain enough, for pondus signifies a waight, which word is well and commonly known amongst the Druggsters how much it contains, and he cited one Pennyes Case, where decem ponderibus without an anglice was held good; and one Wardners Case 21 Iac. in this Court. Next for the word medicamentum being joyned with an anglice, it is a good word to express drugs, for of it self it is no Latin word to signifie any certain thing, and here is no incertainty in the matter, for it may be brought to a certainty to the Juries understanding, and it is not necessary to express the matter like a Scholar, or a Philosopher, but only as they are known by tradesmen according to common understanding. And in an Action brought amongst other things, for a Library of Books, which is more incertain, Judgement was given for the Plaintiff, and Melhuis Case, where the Declaration inter alia was pro decem ponderibus ferri, ten tuns of Iron, was agreed between the parties, and Laurence and Turners Case, Mich. 23. Iac. in Trover and Conversion, pro tribus ponderibus lani, was naught, because it was without an anglice. Serjeant Glin argued to the same effect on the same side. Hales on the other side said, that notwithstanding the anglice the Declaration was incertain. And it is not like the cases de tribus pon-

ponderibus, Anglice, weights of Cheese, or Salt, or stone weight of Cheese. And the word medicamentum is as uncertain as the other word, for it signifies divers species of things. But Roll chief Iustice held, that the Drugs were well expressed by the words in the Declaration in the vulgar and usual acceptation of the words; and for the word weight it is also well known amongst Tradesmen. Nicholas Iustice said, we must not frame niceties to overthrow judgements, and here is certainty enough in both the words to prescribe the thing, and it is impossible to express them aptly and particularly. Roll chief Iustice said, the Declaration is two hundred weight, and every one knows the meaning of a Hundred. Jerman Iustice held the Declaration certain enough, and cited a case where one declared pro decem doliis spirituum, Anglice, ten Hogsheads of Spirits, and adjudged good. Ask of the same opinion, and so the judgement was affirmed, nisi. Declaration.

Dudeny against Collyer.

Trin. 1650. Banc. sup.

Hill. 23 Car. rot. 156.

DUdeny brought a writ of Error against Collyer to reverse a judgement upon a nihil dicit given against him at the Court of Barnestable in an Action of debt brought upon an Obligation, and assigns for Error, that the Condition of the Bond was for the payment of money at Wotton Courtney, which is not within the Jurisdiction of the Court, and so they cannot hold plea for it at Barnestable, and the judgement was given upon a nihil dicit, because the Plea being forein the Defendant would not swear it, which in this case he is not bound to doe. Roll chief Iustice, If it appear by the Declaration that the money was to be paid out of the jurisdiction of the Court, the Judgement is not good, and it is not necessary to swear the Plea, if it appears upon the Obligation that the monies were to be paid out of the jurisdiction of the Court, and he plead payment according to the Condition; but if one will not swear a forein Plea where he ought to doe it, the Plaintif may enter judgement upon a nihil dicit; for such a forein Plea not sworn, is no Plea upon the matter. The Iudgement was reversed nisi, &c. Error to reverse a judgement upon a Nihil dicit in debt upon an Obligation. jurisdiction. Plea Iudgement.

Ley against Anderton.

Trin. 1650. Banc. sup.

Pasch. 1650. rot. 524.

LEy brought a writ of Error to reverse a judgement given in the Common Pleas for Anderton in an Action of Debt upon an Obligation, and Assigns for Error that the Obligor in the Obligation upon which the Action was brought made his wife his Executrix, and dyed, and that the wife being Executrix dyed intestate; and that the Plaintif in the Action took administration of the goods and Chattels of the feme, and brought the action of Debt upon an Obligation, as Administrator to the wife; whereas the Plaintif ought first to have taken Letters of Administration de bonis non administratis of the Testator, and so to have brought his Action. To which the Court agreed; and said it is a plain fault, and reversed the Iudgement nisi, &c. Error to reverse a judgement in debt upon an Obligation. Administration.

Elſy againſt Mawdit.

Trin. 1650. Banc. ſup.

Whether the Husband muſt put in bail for his wife in aſſault and baitery.

ELſy brought an action of Aſſault and Battery againſt Mawdit an Attorney of this Court, and his wife. The Defendant Mawdit appeared in propria perſona, and his wife was in cuſtodia, and ſo the Plaintif declares againſt them; the queſtion here was whether Mawdit the Defendant ought not to put in bail for his wife. Burrel of Counſel with the Defendant argued, that the Declaration was not good, becauſe that the Husband Mawdit ought to have put in bail for his Wife, and cited Smith and Smiths caſe, and Mich. 17 Car. Simon Fanſhaws caſe, and Dyer 377 a. and Brook title Privilege, 353 a. and 9 rep. Roll chief Iuſtice ſaid, he ought to put in bail; Bail. therefore the Plaintif nil capiat per billam, becauſe his Declaration is not good againſt her in Cuſtodia.

The City of London againſt De roy.

Trin. 1650. Banc. ſup.

Cauſe why a procedendo ſhould not be granted to London.

LAtch ſhews for cauſe why a procedendo ſhould not be granted to London againſt De roy, who upon a tryal againſt him was committed in London for uſing the Trade of a working Gold-ſmith, and a working Jeweller, not having ſerved as an Apprentiſe to the Trade, and was brought hither by a Habeas Corpus. 1. That the Declaration is founded upon a By-law, and that By-law is founded upon a Cuſtom, and if either the Cuſtom or By-law be not good in all parts, the Declaration is naught; and here the Cuſtom is certified in the negative, and this is oppoſitum in ſubjecto, and By-law. meerly contradictory in it ſelf, 8 E. 3. 77. and the By-law alſo that is certified is not certain, and it is alſo unreaſonable, for every ſtroke the Defendant ſtrikes, is uſing of his Trade, and it is unreaſonable he ſhould pay five pound for every ſtroke. 2ly. The Declaration is not applied to the By-law upon which it is grounded, for the doing of a thing one day is not uſing to doe it, and the words diverſis vicibus do not help it, for they are not applyed to his working as a Jeweller, but to his working as a Gold-ſmith only; alſo it doth not appear who is to have the forfeiture for one third part of the fine ſet upon him; and it is not ſaid that he gained his living by the Trade or ſale of the commodity wrought, and the words of uſing it pro lucro et profiquo do not help it, for it may be he uſes it for his private uſe, and that is to his profit, though he ſell not the commodity. Next it is unreaſonable that a ſtranger an Alien ſhall be reſtrained by a By-law made 40 years ago, whereof he had no notice, and that by reaſon Notice. of ſuch a Law he ſhould be puniſhed for doing a thing which the Common Law allows, namely to get his own living. It is alſo ſaid, Non exiſtens liber homo uſus eſt arte, &c. which are words very incertain; for by the offence ſo expreſſed every Apprentice may be puniſhed for working, for an Apprentice is not Liber homo. Maynard on the other ſide cited 5 E. 3. that a negative with an affirmative implyed is good, and that it is excluſive of Strangers, and incluſive of the Citizens. And the offence is the matter, & not the time of the Defendants uſing the Trade, & it is alſo well deſigned in all points to what uſe the fine is to be put; and if there be Error they ought to bring a writ of Error, and to except to the Declaration; And this caſe cannot be likened to an Apprentiſes working, for he uſes the

Trade

Trade not for himself but his Masters benefit. The Court desired books, and adjourned it till the next Term.

Custodes libert. &c. against White.

WHite was outlawed in an Action of Trespass, It was moved to reverse the Outlawry, because in the exigent it was Utlest, being put for an abbreviation of utlagatus est, and upon this exception it was reversed. To reverse an Outlawry. Abreviation.

Disne against Grigson.

Trin. 1650. Banc. sup.

Hill. 1649. rot. 98.

DIsne brought an Action of Debt upon an Obligation against Grigson, the condition was for the payment of a certain sum of money upon the resignation of a living, and a certain annual sum at two payments. The Plaintif assigns a breach in not paying such a sum at such a day, upon this the issue was entred, and after the Defendant demurs. Roll chief Iustice, The Defendant is a Mad-man, and we cannot give Judgement against him, stay therefore till he is recovered. Yet take your Iudgement, nisi, &c. for the other may bring his writ of Error if he will. Nota. Demurrer after an issue joyned. Judgement, Error.

Bernard against Levit.

Trin. 1650. Banc. sup.

BErnard brought a writ of Error against Levit to reverse a Judgement given against him in the Common Pleas in an action upon the case for speaking these words of him, Thou Bernard art a base fellow, and didst kill thy first wife. The Error assigned was, that it doth not appear in the Declaration that the Plaintif was maried before. But the Court affirmed the judgement, and said, the Defendant hath confessed it by joyning issue non culp. upon the words. Error to reverse a judgement in an Action upon the Case.

VVood against Topham.

Trin. 1650. Banc. sup.

THis case being an Action upon the Case quare filium suum cepit et abduxit, et maritavit, was again moved, and the exception insisted upon was, that the Plaintif doth not say Cujus maritagium ad ipsum pertinet. But Roll chief Iustice said, that it could not be otherwise intended, but that the mariage belongs to him, and it doth not appear that his Son was maried before, and the value of the mariage is not here material; for the mariage of his Son belongs unto him as a parent, in regard of his protection and advice. Ierman differed, and said, that if he were maried before, he was then Pater Familias, and is out of the protection of his Father. But Nicholas and Ask Iustices agreed with Roll, and Roll said, the matter here is not the loss of the mariage, for that is but to increase the damages, but the Action lies only, quare cepit et abduxit. Adjourned to be argued the next Term. Antea et Postea. Error to reverse a judgement in an Action on the Case. Mariage. Protection

Oreſwick againſt Armery.

Trin. 1650. Banc. ſup.

Mich. 1649. rot. 354.

Error to reverſe a judgement in an Action of Debt. Debt. Cuſtom.

ORes wick brought a writ of Error against Armery to reverse a judgement given against him in Briſtow, in an action of debt upon a Conceſſit ſolvere, according to the cuſtom of the City; but the Iudgement was affirmed, for the Court ſaid, an action of debt will lie by a cuſtom upon a Conceſſit ſolvere, but not if it be brought againſt an Executor.

Cuſtodes Libertat. &c. againſt Valconbridge.

Trin. 1650. Banc. ſup.

To quaſh an Endictment of Aſſault and Battery.

THe Court was moved to quaſh an Endictment of Aſſault and Battery. The Exception was, that the Endictment was taken before the Iuſtices of Aſſize and Gaol delivery, and Oyer and Terminer, and ſo it doth not appear by vertue of what Commiſſion it was taken. Roll chief Iuſtice, He ought to ſhew by virtue of what Commiſſion particularly it was taken, and therefore let it be quaſhed, and a fine of 40 s. ſet upon the Clark of the Aſſizes for his negligence.

Fine.

Bowles againſt Clark.

Trin. 1650. Banc. ſup.

Why a Prohibition ſhould not be granted to the Prerogative.

IT was ſhewed for cauſe upon a rule of Court, why a Prohibition ſhould not be granted to the Prerogative Court, That in the will which the Prerogative Court endeavoured to repeal, there were lands given to the Executor. The Court anſwered, If the Prerogative have power to prove a will, they may alſo repeal it by appeal; but if lands be deviſed, together with goods, they have no power to repeal it as to the lands, but if they ſhould have no power to repeal it as to the goods it would be miſchievous. But they have no authority to make the deviſe good or ill, as to the lands. And the Court was at firſt agreed to grant a Prohibition as to the lands only. But afterwards the Court held that there could be no ſuch diviſion made of the will by Prohibition, as to ſtand good in part, and to be repealed for the reſt, and ſo would not grant the prohibition. Nota.

Prohibition.

Keniſton againſt Crouch.

Trin. 1650. Banc. ſup.

For a rule to enter judgement in the Common Pleas denied.

THe Court was moved that upon a Judgement given in the Common Pleas, ſince the Act that a writ of Error ſhall be no ſuperſedeas, a writ of Error was brought in this Court, and the record removed, but that depends undetermined, and that the party had moved for execution in the Common Pleas; but the Clarks refuſe to make out execution, without the rule of this Court, and therefore a rule was prayed to them to make out execution. But the Court anſwered, proceed as the Act directs, we will make no rule; But we conceive there is no writ of Error now depend-

Rule.

ing

ing, and therefore you may take out execution of Course. Q. Tamen, for it was doubted at the Bar. Execution.

Denton against Harison.

Trin. 1650. Banc. sup.

DEnton brought an Action upon the Case against Harison in London, for speaking these words, Thou art a Whore, and my Husbands Whore, and he doth maintain thee. The Defendant removed the cause into this Court by a Habeas Corpus, whereupon the Plaintif moved for a procedendo. Roll chief Justice was of opinion that a procedendo ought to be granted, for if it should not, the party hath no remedy to proceed; and if they do proceed in London, and the judgement be thereupon erroneous, the party grieved may bring a writ of Error in the Hustinges, and reverse it. Ierman Justice said, here is a wrong done, and the remedy is given according to the custom of the City, and it is a good custom, because it is for the preservation of the Peace of the City, and it is the custom of the City to whip a Whoremonger, and to Cart a Whore; and this may be the ground or reason why an action lies in London for calling of a woman whore there, thought it doe not lie in other places. For a Procedendo to London. Custom.

Trin. 1650. Banc. sup.

VPon an Issue joyned, and a Tryal thereupon, a Verdict was found for the Plaintif, and the Postea was delivered to the Clark of the judgements to enter the judgement; but through the Clarks neglect execution was taken out, the Judgement being not entred, upon this the Court was moved that the Judgement might not be entred, because it should have bẽn entred before Execution issued forth, and therefore it was suggested that now it was too late, and prayed to supersede the Execution, because there was no judgement to warrant it. But Roll the Chief Justice answered, that this being but a neglect of the Clark, judgement might be well enough entred, though the Execution were issued forth, and because the tryal betwẽn the parties is right, therefore let it be entred. That Judgement might not be entred. Judgement. Supersedeas.

Cane against Pell.

Trin. 1650. Banc. sup.

CAne brought an Action of Debt upon the Statute of 2 Ed. 6. for subtraction of tithes, against Pell, and hath a verdict against the Defendant: The Defendant moved in Arrest of Judgement, and took an Exception to the Plaintifs Declaration; That it did not appear by it in what Parish the lands lie, out of which the tithes grew due. On the other side it was said, it appeared well enough by implication; but if it did not, it is not now material, there being a verdict in the case by which it is helped. Ierman Justice said, there is only an implication to shew in what Parish the lands lie, and that is not a violent implication neither, and therefore the Declaration cannot be good. But Roll Chief Justice answered, What if the Plaintif had only said, that the tithes belonged unto him? And it is here after a verdict, and the Declaration is helped by it; but if you had demurred to the Declaration, it would have been ruled to be naught. And if the tithes do belong to the Plaintif, why may it not be implyed that they Arrest of Judgement in an action upon the Statute for tithes. Declaration. Demurrer.

belong to him as Parson of the Parish, and are of lands lying within the Parish: But let us see a Book, and speak to it again the next Term.

Robinson against VValker.

Trin. 1650. Banc. sup.

Pasc. 1650. rot. 251.

Demurrer for doubleness in a replication.

VValker brought an Action upon the Case upon an indebitatus Assumpsit for wares sold. The Defendant pleaded the Statute of limitations of Actions in Bar. The Plaintif replyed, that he is a Merchant, and was in Ireland, and did not return thence till such a time, and shews precisely when, and that within six years after his return he brought this action. Upon this Replication, The Defendant demurred, and upon the Demurrer Judgement was given for the Plaintif. The Defendant brought a writ of Error to reverse this Judgement, and assigned for Error, 1. That the replication of the Plaintif, upon which the Demurrer was joyned, is double; For first he allegeth that he is a Merchant, & so is a person out of the Statute of limitations: And secondly he shews that he brought his Action within 6 years after his return, which is needless. 2ly. He saith, That he did not return into England, whereas the Statute is general, If he return, and he may return into Wales. But to that the Court answered, that to return into England, or into Wales, was all one as to the intent of the Statute. 3ly. The Action was an Action upon the Case, & that Action is not mentioned in the Statute. But Roll chief Iustice said, this is no new Case; for it hath been ruled that an Action upon the Case is within the Statute. Ierman Iustice said, the Proviso of the Statute is intended to be as large as the body of the Act. Nicholas Iustice to the same effect, and said, that the word Trespass mentioned in the Act doth comprise in it an Action upon the Case. The Iudgement was affirmed, nisi.

Case.

Trin. 1650. Banc. sup.

To quash an Indictment.

An Indictment was quashed, because it was said to be taken ad generalem Sessionem Pacis Custodum libertatis Angliæ, where it ought to be Sessionem Pacis publicæ, by Ierman Iustice, absente Roll.

Treton against Squire.

Trin. 1650. Banc. sup.

To have a Prisoner to testifie at a Trial.

The Court was moved that a Prisoner in the Marshalsea might have liberty by rule of Court to be at a tryal to give his testimony as a Witness in the cause. Ierman Iustice, absente Roll, answered, Bring him thither by a Habeas Corpus, but take a good guard with him, for it shall be at your peril if he escape, and he shall be brought thither, and carried back again at your own charge.

Habeas Corpus.

Gibs

Gibs againſt Price.

Trin. 1650 Banc. ſup.

Gibs a Barreſter of Lincolns Inne brought an action upon the caſe a- Arreſt of
gainſt Price for ſpeaking theſe words of him, William Gibs hath dealt ludgement in
falſely with me being his Clyent, and hath joyned with mine Adverſary. an Action for
Upon not guilty pleaded, there was an iſſue joyned, and a Verdict given words.
for the Plaintif. The Defendant moved in Arreſt of Judgement that the
words were not actionable. But the Court held clearly the words were
actionable, and were ordering judgement to be entred for the Plaintif, Caſe.
but becauſe another exception was taken, That the Plaintif doth not aver
that he was a Practiſer at the time of the bringing of his Action; and becauſe Averment.
it was alſo objected that the Plaintif was now ſequeſtred, Therefore the
rule was, that the Record or the Poſtea ſhould be brought into the Court,
and that Counſel ſhould again be heard. This was moved again, And
Roll chief Iuſtice ſaid, That the Plaintif ought to aver he is a Practiſer, for
he may be a Barreſter and not practiſe. But the Court would adviſe.

Boomer againſt Cleve.

Trin. 1650. Banc. ſup.

In this Caſe in Arreſt of Judgement upon a verdict given for the Plaintif Arreſt of
in an Action upon the Stat. of Winch. 12 E. 1. of Hue & Cryes, the queſtion ludgement in
being, whether the Plaintif in his Declaration had miſ-recited the Statute an Action up-
or not, Roll chief Iuſtice took this difference, that if one bring an Action on the Sta-
upon a Statute, and in his Declaration miſ-recite it, in words which go ture of 12 E. 4.
to the ground of the Action, though there be a Verdict in the caſe, yet it of Hue and
is not helped; but if the miſ-recital be in words which doe not goe to the Cries.
ground of the Action, it is helped after Verdict by the Statute of Ie- Recital.
ofails. Ieofails.

Bynion againſt Trotter.

Mich. 1650. Banc. ſup.

Bynion brought an Action upon the Caſe againſt Trotter for ſpeaking Arreſt of
theſe words of him, He is a Thief, and hath ſtollen my Turnips and ludgement in
my graſs. Upon a Verdict given for the Plaintif, The Defendant mo- an Action for
ved in Arreſt of Judgement that the words are not actionable, becauſe the words.
graſs might be growing upon the ground, and the Turnips in the ground, Caſe.
and ſo part of the Freehold. But Roll chief Iuſtice held, the words are ac-
tionable, for the Turnips ſhall be intended to be pulled up, and the Graſs
mowed, & the laſt words are not cumulative. Therefore let the Defendant
ſhew cauſe why the Plaintif ſhall not have his Iudgement.

Pinder

Pinder againſt Dawkes.

Mich. 1650. Banc. ſup.

Error to reverſe a Judgement in Treſpaſs quare clauſum fregit.

PInder brought an Action of Treſpaſs againſt Dawkes, and declares, quare clauſum fregit contra pacem publicam, et poſtes et palos ſuos ibidem nuper inventos cepit et aſportavit. The Plaintif hath a Verdict and a judgement, the Defendant brings a writ of Error to reverſe the judgement, and aſsigns for Error, 1. That the Treſpaſs was done in the late Kings time, and therefore the Declaration ſhould have been contra pacem Domini Regis, and not publicam. 2ly. That the Declaration is incertain; for it appears not whether the Poſts and Pales were fixed to the ground or no, nor how many of them there were, and ſo the nature of the offence cannot be certainly known. But the Court held that the firſt exception was but a miſtake of the Clark, and ſo may be amended, and as it is there is no repugnancy in it. And as to the ſecond, the Court held that it ſhall be intended that the Poſts and Pales were not fixed to the ground; and there is no neceſsity to expreſs how many Poſts and how many Pales the Defendant took, and it is not material whether they were fixed or not. But the Court would adviſe, and ordered Councel to ſpake again to it.

Amendment.

Intendment.

Popham againſt White

Mich. 1650. Banc. ſup.

Exception to a Declaration in a Trover and Converſion.

AN Action of Trover an Converſion was brought, wherein the Plaintif declared pro Arboribus. Twiſden of Councel with the Defendant argued that the Declaration was not good, becauſe a Trover cannot lie de Arboribus. Roll chief Iuſtice, he may declare de Arboribus, if he ſay that he was poſſeſſed ſicut de Arboribus ſuis propriis. But Ierman Iuſtice doubted Therefore the Court would adviſe.

Martin againſt Hendlye.

Mich. 1650. Banc. ſup.

Arreſt of Iudgement in an action of Debt againſt a Sheriff for an eſcape.

Advantage.

Detinet.

MArtin brought an Action of Debt againſt Hendlye a Sheriff for an eſcape, and had a Verdict againſt him. The Defendant moved in Arreſt of Judgement, and took theſe exceptions. 1. That the Action was brought by the Plaintif as an Adminiſtrator, for the eſcape, which was made in the life of the Inteſtate only. 2ly. That there is no Capias iſſued to the Sheriff. The Court anſwered, That the Sheriff cannot take advantage of an erronious proceſs; but the firſt exception is good, for the Action ought to be brought in the Detinet only, the Plaintif being but an Adminiſtrator, who recovers not to his own uſe. Therefore ſtay Iudgement till the Plaintif move.

Dethick

Dethick against

Mich. 1650. Banc. sup.

DEthick moved for a Prohibition to the Admiralty for preferring an Endictment there, which is not within the Statute touching the Admiralty, and so they have no jurisdiction of the cause. The Court answered, that a Prohibition lies not in cases of Felony, but if there be Cause it may be removed by Certiorari. But we will advise. For a prohibition to the Admiralty. Prohibition. Certiorati.

Bennet and the Hundred of Hartford.

Mich. 1650. Banc. sup.

IN a tryal at Bar between the inhabitants of Hartford and Bennet a Carrier upon an Action brought against them upon the Statute of Winchester, for a robbery committed within that Hundred upon his servant, It was said by the Court, that if either of the parties to a tryall desire that a Juror may give evidence of something of his own knowledge, to the rest of the Jurors, that the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions. And it was also said, that if a robbery be done in crepusculo, the Hundred shall not be charged; but if it be done by cleer day light, whether it be before Sun rise or after Son set, it is all one, for the Hundred shall be charged in both cases. Evidence by one of the Jury to the rest. Evidence. Examination. Where a hundred shall be charged for a robbery or where not

Mich. 1649. Banc. sup.

SErjeant Earl, A Jury being ready at the Bar for a tryal, challenged the Array for want of Hundreders, and delivered in the challenge in writting to Woodward the Clark of the Court to be read; But the Court interrupted him, and said to the Serjeant, you ought first to read it your self in French, which he accordingly did, and afterwards Woodward read it in Latin. Twisden of Councel on the otherside said, that the challenge was taken to no purpose, for the Jury was returned by the Secondary by rule of Court, and the Hundreders were put out by the consent of the parties; But the Court answered, that the consent of the parties was to no purpose to avoid the challenge, but that it was a good challenge, and there cannot be a tales granted upon a challenge for default of Hundreders, and therefore the panel was quashed, and a new Jury ordered to be returned by the Sheriff. In this case it was said, that after the first man of a Jury is sworn, the Array cannot be challenged. A challenge of the array for want of Hundredors, the manner of it. Consent. Challenge. Tales.

Cage against Dod.

Mich. 1650. Banc. sup.

VPon a tryal between Cage and Dod touching a Copphold it was said by the Court, that a Coppholder for life cannot prescribe against his Lord; but a Coppholder in fee may, for he hath the Copphold in the nature of Land of inheritance. And also that if a Coppholder for life cut down tymber trees, the Lord may take them. And that if an under Lessee for years What copyholder may prescribe against his Lord, and what not.

Forfeiture. of a Copyholder cut down tymber, it shall not be a forfeiture of the Copyholders estate.

The Countesse Rivers.

Mich. 1650. Banc. sup.

A Plea of privilege of peerage by a Countess. Privilege.

The Countesse Rivers put in her plea of Privilege of Peerage into Court, and prayed by Serjeant Glin of her Councel that it might be read, and allowed. Upon which it was read by Woodward Clark of the Court. After which Roll chief Justice said, it is questionable whether a Countess made so by patent only for her life be privileged or no, therefore let her remain in the Custody of the Sheriff till Saturday, and not be turned over to the Custody of the Mareschall, and then move it again. Postea.

Burton against Low.

Mich. 1650. Banc. sup.

Demurrer in debt upon a Sheriffs bond.

Burton brought an Action of debt against Low, upon a Sheriffs bond given by Low to the Sheriff, being arrested by him by virtue of an Attachment directed to him out of the Chancery, the condition of the Bond was, that the Defendant should appear on such a day in Cancellaria apud Westmonasterium ubicunque fuerit. The Defendant pleads in Bar the Statute of 36 H. 6. the Plaintiff demurred to this plea. Moseley of Councell with the Defendant argued that the Bond upon which the Action was brought was void, and against the Statute. 1. Because the party is bound to appear in a Court, which is not a fixt Court, and so incertain, namely the Court of Chancery at Westminster, whereas the Chancery is a moveable Court, and not fixt to Westminster or any other place. 2ly. The condition of the Obligation is impossible, for it is that the Defendant shall appear in the Chancery at VVestminster wheresoever it shall be, and it is impossible for him to appear at VVestminster, and at another place at the same time. 3ly. The Bond varies from the Statute in some things, and enjoyns more than the Statute requires in other things. VVilmot on the other side held that the Bond is not within the Statute, because the King is not within the Statute, as was held 13 Car. & 7 H. 4. f. 44. 5 rep. VVhelpdales case, Dyer 119. Roll chief Justice held, that a Bond given to appear upon an Attatchment out of the Chancery is within the Statute; but it hath been heretofore a question whether a Serjeant at Arms of Wales were within the Statute; but it hath been since ruled that he is not, and here is a material variance in the Bond, which makes it void, and neither the upper Bench nor the Chancery are fixt Courts, and therefore the Defendant ought not to be bound precisely to appear at VVestminster, and then to add ubicunque fuerit is a material variance, and makes the Bond naught. Ierman Justice to the same effect, and said, that the Chancery may sit at any time out of the Term when they please, and their not sitting in the Vacations, is for the ease and conveniency of the people. Nil capiat per billam nisi, &c. Antea.

Obligation.

Chancery.

Variance.

Paine

Paine against Prestny.

Mich. 1650. Banc. sup.

PAine brought an Action upon the case against Prestny, for speaking these words (to a Constable) of him; Take charge of him, and carry him away, for I lay flat Felony to him, and for speaking these words to the Plaintiff himself, I will make you hold up you hand at the Bar: upon not guilty pleaded an issue was joyned, and a verdict found for the Plaintiff. It was moved in arrest of Judgement that the words are not actionable; but the Court held them clerly actionable, and ruled the Plaintiff to take his Judgement, except other cause were shewed to the contrary Friday following. Arrest of judgement in an action for words.

Popham against VVhite.

Mich. 1650. Banc. sup.

VPon a verdict found for the Plaintiff in a Trover & Conversion, the Defendant in Arrest of Judgment took exception to the Declaration because the Plaintiff had declared of a Trover & Conversion de decem arboribus, whereas the trees were Tymber trees that were felled, so they are not well expressed, for the word arbor properly signifies a tree that grows, and not one cut down, according to the old verse, Arbor dum crescit lignum dum crescere nescit, and so a Trover cannot be brought pro arbore. But Roll chief Iustice said, that they were well enough expressed by the Declaration, and that they ought not to be too strict in scanning some words where the thing is well described. Arrest of Judgement in a Trover and Conversion. *1. Rol. 500, 75.* Declaration. Description.

Goffs Case.

Mich. 1650. Banc. sup.

CLement Goff of Greenwitch in Kent, arraigned of felony at Maidstone in Kent, and there condemned, was brought to this Bar, and there it was demanded of him by the Clark on the criminal side, what he could say why he should not suffer death according to his Judgement? whereupon the Prisoner pleaded he had a pardon, and produced it, and it was read openly, the Prisoner kneeling on his knees in the mean time; after reading of it, he was asked what it was he demanded, besides of the Court? he answered, that he praped his pardon might be allowed, which, after Iserman Iustice had made a grave speech to exhort him to a better carriage for the future, was done accordingly. A pardon for Felony pleaded and allowed.

VVood against *T*opham.

Mich. 1650. Banc. sup.

THe case between VVood and Topham being an Action of Trespasse, quare filium et heredem suum rapuit et maritavit, was again spoken unto, and in arrest of Judgement Green took these exceptions to the Declaration. 1. That it is too short, because that after the words quare filium suum & heredem rapuit & maritavit, there ought to have been added cujus maritagium ad ipsum pertinet, for else it appears not that the Plaintiff hath cause of Action, Instit. f. 20. & 35 El. Child and Towrs case Banc. Reg. 21p. Arrest of judgement in trespass quare filium et heredem rapuit & maritavit.

The Declaration doth not say filium suum apparentem, which it ought to do, because the Father is alive. 3ly. It doth not expresse the Heir to be infra ætatem. 4ly. It doth not say the Heir is in custodia sua. 5ly. It doth not shew that the Heir was not married before. 6ly. It doth not shew that the Plaintiffs Father is dead, 12 H. 4. f. 16. Brev. Tit. Trespasse, 101 Nat. brev. 142. Reg. 163 Nat. Brev. 140. 20 H. 6. f. 44. And he said, that a Declaration ought to be certain; but that here was no certainty, by reason of the former exceptions. VVilmot on the other side said the Declaration was certain enough, and according to the presidents, and cited the Register, f. 88, 89. & 5. rep. Ratcliffs case. Roll chief Iustice said, It is a Trespasse to take away a mans Son and Heir, although he be not within age; but if it be another Son it is not so. Nicholas Iustice to the same effect; But because the Court was not full, & in regard that the damages given by the Jury were excessive, the Court deferred to give Judgement that time, and perswaded the Plaintiffs councell to go to a new new tryall. Antea et Postea.

Declaration. Trespass.

Marshall against Ledsham.

Mich. 1650. Banc. sup.

Arrest of Judgement in debt by an Administrator.

MArshall brought an Action of Debt as an Administrator against Ledsham, and obtains a verdict against the Defendant. It was moved for the Defendant in arrest of Judgement, That the Plaintiff had not shewed in his Declaration by whom the Letters of Administration were granted unto him, as he ought to do, according to the books of 26 H. 6. 29. & 35 H. 6. The Court answered that he ought to have set it forth, and therefore the Plaintiff might have demurred to the Declaration; but it now being after a verdict, the question is, Whether that fault be not helped by it? And therefore they would advise. Postea.

Demurrer

VVats and his wife against Lord.

Mich. 1650. Banc. sup.

Arrest of judgement in an Assault and Battery.

VVAts and his wife brought an Action of Trespasse of an Assault and Battery against Lord, and obtain a verdict. The Defendant moved in arrest of Judgement, That the Declaration was by the Baron and Feme, for an Assault and Battery made to the Feme, and they also declare that the Defendant alia enormia eis intulit, which ought not to be, for the wrong being but a personal wrong done to the person of the Feme only, could not be said to be done to the Husband. To which Roll chief Iustice agreed.

Fairefax against Fairfax.

Mich. 1650. Banc. sup.

Error to reverse a Judgement in dower.

IN a writ of Error brought to reverse a Judgement given in a writ of Dower these exceptions were taken; 1. That the original was not well returned, for their appears not to be any return of the Proclamation of the summons, and though the party do appear, yet it was said that it is not helped thereby. 2ly. The demand is incertain, for the demand is de certis parce decimarum garbarum in Colton, and by this

this demand the Kind of the Tithes demanded is not made certain, for the word garba admits of divers constructions, and so Lynwood the Civilian shews. 3ly. It is not expressed whether the Defendant be terr-Tenant, or heir. 4ly. The demaund is ac etiam de rectoria de Acerstall Malvis, which is incertain, for it ought to be de rectoria ecclesiæ. Roll chief Iustice to the 1. Exception said, that the appearance of the party will help miscontinuances of proces, and so it doth here. Hales to the 2d. exception said, that decimæ garbarum is certain enough to common understanding. To the 3d. Exception he held it not necessary to say de rectoria ecclesiæ, for it must be so necessarily intended. The Court desired to see books, and so it was adjourned. At another day the case was again moved, and these spoken to and answered, 1. As before that decimæ garbarum is certain enough to common intendment. 2ly. That it is not necessary to express the setting forth of the down in the tithes by metes and bounds, for tithes cannot be so set forth, and it is not constant to use the expression per metas et bundas. Latch took another exception that it was improperly expressed, for one to enter into an Advowson. And to the exception formerly taken, he held that the Proclamation of summons ought to have been returned, and that fault is not helped by the late Act, because it is matter of substance, and not meer matter of form, and he said that appearance of the party doth salve a discontinuance of mean processes; but not of originall processe as this is, which is the very foundation of the Action, and that though the want of a summons be helped by the partyes appearance, yet the want of returning the summons is not helped by the partyes appearance. Nort he held, as formerly, that decimæ garbarum is incertain, and that the nature of the corn ought to be shewed. Roll chief Iustice said, that the not returning the proclamation of summons is not material, for the summons is only to make the party appear, and he hath appeared in this case, and the late Act extends to it if it were not good without it. And the demand of tertiam partem garbarum is certain enough by common intendment, but it seems more certain here than so, for it is tertiam partem garbarum granorum which signifies corn; And it is not necessary to express the setting forth of the down per metas et bundas, but it is well as it is without that expression. And lastly, It is well enough said, ingressus est into the advowson, although it be not so proper an expression as might have been used, for it is good enough to make the party tenant. Ierman Iustice to the same effect, and said, that if there be two Tenants in Common, and one of them dye, it is a great question how the wife shall be endowed, viz. whether per metas & bundas or no. And he doubted whether the Writ of error here brought were good or not, for it is returnable coram custodibus libertatis, &c. apud Westmonasterium, whereas as it ought to be coram custodibus ubicunque, for they are not fixed to Westminster. Nicholas Iustice to the same effect. Roll chief Iustice said it was a good exception that Ierman took to the Writ of error. But the Court was here at Westminster at the return of the Writ, and the Writ was made by the Custodes themselves, and the partyes did appear upon it, and therefore he questioned whether it might not be made good for these reasons. Ierman Iustice held it could not. Roll chief Iustice said that all the Latin presidents are agreeable to this Writ, and it would be dangerous to alter them; But let the curitors attend, and give their reasons why they do not alter this form, and if the Writ be good, me thinks the Judgement should be affirmed. Yet we will advise a little of the writ, and whether the demand of decimam partem garbarum, without granorum, be good or not. Postea.

Miscontinuance.

Return.

Error.

Presidents.

Lumley againſt Nevil.

Mich. 1650. Banc. ſup.

Error in an habere facias poſſeſſionem.

IN a writ of error brought upon a Judgement given in an ejectione firmæ, It was ſaid by Roll chief Iuſtice, That if the writ of habere facias poſſeſſionem do contein more Acres of Land than are expreſſed in the Declaration, that it is error. But if the Sheriff do give poſſeſsion of more Land than is conteined in the writ of habere facias poſſeſſionem, an Action of the caſe lies againſt the Sheriff, or an Aſsiſe lyes for the land. It was alſo ſaid, that if a Iudgement be affirmed upon a writ of error in the Exchequer Chamber, yet they cannot grant out execution there; but it muſt be in this Court.

Error. Caſe. Aſsiſe. Execution.

Hunt againſt Popham.

Mich. 1650. Banc. ſup.

The court not to be moved for a rule where it may be given in the office. Nonſuit.

IT was moved for the Defendant to have the rule of Court for the Plaintiff to bring in the poſtea, that the Defendant may move in Arreſt of Iudgement. The Court anſwered they would make no rule, for the Defendant may give rules in the office to force him to it, and if he will not bring it in he is to be nonſuit.

Fairefax againſt Fairefax.

Mich. 16 o. Banc. ſup=

Whether a demand in dowr good or not.

THe Caſe between Fairefax and Fairefax was moved again; and Hales held that the demand of dowr de decimis garbarum was certain enough, though it be not garbarum granorum, and he cited the Regiſter 46. and Dyer, f. 84. and one Cavendiſhes caſe, 8. Iac. Roll chief Iuſtice took a difference between a demand of Tithes, and the ſuing for a recompence for Tithes, upon the Statute of 2 Ed. 6. and cited the Regiſt. 165. and he held the demand here to be good, with whom concurred the other Iudges. Ask Iuſtice ſaid, that a garb is a french word, and ſignifies any thing bound up into a bundle; but by Cowell the Civilian it ſignifies Corn bound up, and ſo is the word commonly uſed at the Common Law. Roll chief Iuſtice ſaid, that a demand in a præcipe ought to be more certain, than it is neceſſary for a demand in dowr to be. Latch ſaid that the words coram nobis apud VVeſtmonaſterium is part of the ſtile of the Court, which Roll chief Iuſtice denyed, yet he ſaid it was well enough, becauſe the Court was there at the return of the writ of Error. To which the other Iudges agreed, and the rule was that the Iudgement ſhould be affirmed niſi, &c. antea.

Demand.

Mich. 1650. Banc. ſup.

Moved to diſcharge an arreſt

THe Court was moved that one was arreſted upon a day of thanks-giving appointed by the Parliament, and that he was forced to put in bond to the Sheriff for his appearance, and therefore it was prayed that the party arreſted might be diſcharged, and that the bond given to the Sheriff

rif might be delivered up. Roll the chief Iustice answered, Endict the Bailies that made the Arrest, or bring your Actionagainst them if you please, for we will not discharge the party arrested. Discharge.

Bois against Cranfield.

Mich. 1650. Banc. sup.

rot. Q.

BOis as Executor to another brought an Action of Debt upon divers Obligations made to his Testator. The Defendant pleaded that he did pay a lesser sum than is expressed in the Obligations to the Testator during his life, and that he did accept thereof in full satisfaction of the said Obligations. To this plea the Plaintif demurred. Roll Chief Iustice upon opening the matter said, that the question here is, whether the payment, or the acceptance of the money paid in satisfaction be to be traversed. And he held it was indifferent to traverse either of them; but he said it was more proper to joyn issue upon the payment, but the Court would advise. It was then also said, that if one pay money in satisfaction of an Obligation, and the party to whom it is paid saith that he will receive it for another cause, yet if he receive it it shall be judged to be paid in satisfaction of the Obligation; for he must receive it upon such terms as the other will pay it. Debt upon divers Obligations by an Execution. Traverse. Satisfaction, payment.

Brian against Stone.

Mich. 1650. Banc. sup.

STone moves the Court for an Attachment against Brian and others, for that he was arrested by a Latitat out of this Court in the County of Wilts, and thence carried into the Town of Malborow, and there arrested by a Serjeant of that Town by a writ out of that Corporation, and the Plaintif proceeds there against him upon that writ, and not upon the latitat, by which he was first arrested, which is a contempt to this Court. The Court ruled the party should have an Attachment, nisi, &c. and also should have a Habeas Corpus cum causa. For an Attachment. Attachment. Habeas Corpus cum causa.

Mich. 1650. Banc. sup.

THe Recorder of London moved for the Inhabitants of Bishopsgate against one Withringes; who for refusing to serve upon the Ward mote Enquest was indicted for his refusal in London, and convicted and fined 20 l. the Defendant being committed for not paying his fine, removed himself hither by a Habeas Corpus, but now hath submitted himself to a fine, it was therefore prayed he may be moderately fined here. The Court thereupon fined him 20 l. For the setting a moderate fine upon one that submitted to a fine.

Beal

Beal against VVyman.

Mich. 1650. Banc. sup.

Trin. 1649. rot. 849.

Question upon words of a Will.

VPon these words of a will, viz. I give and bequeath one half of my lands to my wife, and after her death I give all my lands to the heirs males of any of my Sons, or next of Kin, Latch made question in the Case, 1. Whether there were a good estate created by these words of the will. 2ly. Whether the estate were destroyed by the fine levied of the lands. For the 1. he held, that the heirs males of any of his Sons, are words certain enough to create an estate; for it is all one as if he had said to the heirs males of all his sons, if they have heirs males, or to those who have heirs males, and the words, or to the next of Kin, are also certain enough, being joyned with the precedent words, and shall be meant to the next of Kin, and their heirs males, if his sons have no heirs males; For in a Will if there be words to express the meaning of the Testator it is sufficient enough, though the words be not apt. And he cited 21 Rich. 2. Devise 27. and 8 Rep. 46. and said, that the case in 30 Ass. pl. 47. is the same with this in terminis. And here is no contingent remainder, but only a contingent devise, & there is no necessity for a particular estate to support it; for it ariseth out of the estate of the Devisor; yet if there were need of a particular estate here to support the remainder, here is a particular estate in the wife, who by implication of the will doth take all the land during her life, as it is 13 H. 7. 29 H. 8. Br. Devise 48. Trin. 3 Ed. 6. Bendloes. Plow. Com. 521. Whelpdales case, Pasch. 25 Eliz Com. Ban. To the 2 point he spake not, holding it not material. Hales of Counsel on the other side held, that the wife had not an estate for life in all the land by implication of the will, but only an estate for life in a moyety of the land, and so there is no particular estate to support the contingent remainder, which he held was in this case; & that it is not a contingent Devise as Latch urged; for the remainder here depends by way of remainder, and not as a contingent Devise. And he held the Devise it self to be void, admitting all the precedent matter alleged to be true. 1. Because the devise is uncertain; for the intent of the deviser doth not appear; for it appears not what heir male shall have the land, whether the heir male of his son, or the heir male of his next of Kin; for the words are disjunctive; 41 & 42 Eliz. Com. Banc. in the Case of Tayler & Sawyer land devised to a Mans Issue was adjudged a void devise for the incertainty of it. And he held that the intent was that the heir male of his son should inherit before the heir male of the next of Kin, otherwise the further off of Kin should have the land before the nearer of Kin. And he said that Hil. 21 Car. Rot. 1288. Com. Banc. in Hunt and Fishers case, the case at the Bar was adjudged in point. Roll chief Justice said, That the intention of the Testator here is cœca & sicca, and senceless, and cannot be known, and we ought not to frame a sence upon the words of a Will, where we cannot find out the Testators meaning. Jerman Justice held, that the devise was not void, but that the words are to be interpreted as they may stand with Law, and as the words will bear. Nicholas Justice prima facie that the devise is void, but yet it is questionable. Ask Justice to the same intent. Roll chief Justice said, that there is too much way usually given to ambignous devises. But let it be argued again the next Term.

Intention.

Will.

Parker

Parker against Cook.

Mich. 1650. Banc. sup.

Hill. 23 Car. rot. 660.

The Action was an Action of Trespass quare Clausum fregit: The Defendant pleaded a special plea of justification, viz. That the Plaintif was a Copyholder to his Manor, and that for refusing to appear and do his service at his Court he had forfeited his Copyhold, and that therefore he did enter. The Case was this, The Defendant being Lord of the Manor, and holding of his Court, the Plaintif being Tenant, and being in the Court, and there being a question whether the Court were legally then held or no, and being asked if he did appear or not, he answered, If it be a legal Court, I do appear, but if it be not a legal Court, I do not appear. The question was, whether this be an appearance, or such a refusal to appear whereby the Copyholder shall forfeit his Copyhold, or not. Latch held it was no appearance, and that therefore the Copyhold was forfeited, and cited 43 Ed. 3. f. 25. And he said, though it be not expressed by the Defendant, that the Plaintif was legally summoned to appear in Court, it is not material, seeing he was present in Court, and did refuse, being demanded, to appear. And that this was a sufficient contempt to make a forfeiture. And he said that the Rejoynder is ill; for it is dixit comparuit, and he doth not answer to the fact alleged, viz. That he denied to do his sute and service. Wild on the other side said, that it is no forfeiture; for if the Court be well held, then he doth appear, as his words do plainly manifest, and so there is no contempt; and if the Court were not well held, his not appearing shall not hurt him, for he is not required to do it. 37 Eliz. Est and Hardinges case, and 4 rep. 27. Hobard and Hamonds case: And besides, this cannot be a voluntary contempt, because he did appear conditionally, and did not absolutely refuse. And the Replication hath not entitled you to a forfeiture. Besides it appears not here that the Court was legally summoned, as it ought to do, nor that there was any proclamation made for the holding of the Court, nor any notice given to the Tenants of the holding of the Court, 38, 39 Eliz. Banc. Reg. Crisp and Dyer. Roll chief Justice, This case hath depended long. It is a hard thing to make a forfeiture of the Copyhold, if there was a real controversie whether the Court was well held or not; but if not, and that the words were used only as a shift to avoid the Plaintifs sute and service, it is a forfeiture; for the words are like Jack in a Box, and no body knows what to make of them. Jerman, Nicholas, and Ask enclined that it was no forfeiture. Adjourned to the next term.

Upon a Demurrer the question was, whether a Copyhold were forfeited or not.

Forfeiture.

Fielder against Tovy.

Hill. 1650. Banc. sup.

Pasch. 1650. rot. 430.

Fielder brought an action of debt upon a bond given to the Sheriff by Tovy the Defendant, to appear to the Plaintif in the Upper Bench, to an Action there brought against the Defendant. The Defendant appears, and demurs to the Declaration, and shews for cause, that the Bond upon which

Demurrer to a Declaration upon a Sheriffs Bond.

the Plaintif declares, and the Declaration do not agree, for the Plaintif declares pro quadragint. libris, and the Obligation mentions, that the Defendant is bound in quadragent. libris. Divers cases were put to resemble this, viz. Massam and Iollies case, where sexigint was put for sexagint. and yet held good, and Waters case, where septuagint. was put for septingent. And Downes and Hussies case, 12 Car. Banc. Reg. where quingint. duabus libris was used instead of quinquagint. and yet held good, because it might be an abbreviation of quinquagint. Ierman Iustice held the Declaration not good, because the condition of the Obligation is to doe a collateral thing, and so it cannot appear by it what the sum is in which the party is bound, as it may where the condition is for the payment of money. Roll chief Iustice held the Declaration not good, because the Bond upon which it is grounded doth not warrant it, and the meaning of the word cannot here be known, and if the Condition were not collateral it would not help it. Nicholas Iustice differed, and said, it would be hard to make it no Obligation for the mis-writing of a word, and therefore it were good to search presidents, for it as a considerable case. Ask Iustice said, the meaning is obscure, and this makes the difficulty. Adjourned, Postea.

Declaration.

Wentworth against Wentworth.

Hill. 1650. Banc. sup.

Mich. 1650. rot. 531.

WEntworth brought an Action of Debt against Wentworth upon an Obligation; The Condition of it was this in effect, That whereas the Defendant had granted an annuity to the Plaintif, that the Defendant should make further assurance to the Plaintif for the enjoying thereof within one month, when he should be thereunto required: Upon a special verdict the question was from what time the month should begin, whether from the date of the Obligation, or from the time of the request to be made. Latch held it should begin from the request, and not from the date of the Obligation, because a month from that time is too small a time to do the thing required, but if it shall be after the request it will be a proportionable time fit for the doing it. Roll chief Iustice, If there be an indifferent construction, which may be taken two ways, we will take it that way which is most reasonable to make the Obligation stand in force, and me seems the words here are plain, namely, that the assurance shall be made within a month after request, & not after the date of the Bond. Ierman Iustice to the same effect, and said, that although the request for further assurance were not within one month after the date of the bond, yet the party may require it after the month is ended, and within a month after such request the assurance is to be made, and the Obligation shall be intended for the benefit of the Obligor. Nicholas and Ask Iustices to the same effect, so judgement ruled for the Plaintif, Nisi, &c.

Interpretation.

Child

Child against Guiat.

Hill. 1650. Banc. sup.

Hill. 1649. rot. 153.

IN an Action upon the Case upon an Assumpsit made by the Defendant to pay the Plaintiff a certain sum of money, at a certain day. Upon a speciall verdict, The question was whether there were a variance between the promise, and the Declaration, which question grew from the doubt, whether the day of payment in the Assumpsit shall be intended according to the old stile, or according to the new, for if it were intended one way there was no variance, if the other way there was a variance. Hales held that there was no variance, and though there should be, yet he said the Plaintiff ought to have Judgement; because the time in this case is not material, for the debt for the payment whereof the promise was made, appears to be due upon an Accompt made between the parties, which time is past, and grows not due upon the Assumpsit, for this is no new promise in Law, and it is all one here as if the promise had been set forth that he promised to pay, when he should be thereunto required. And whereas it hath been objected, that the debt upon the Accompt appears to be due by two, and that the Action therefore ought to have been brought against them both, and not against one of them as it is here, he answered, that the Action may be brought against both, or any one of them at the election of the party, and the custom of Merchants makes no difference in the case, for the Law creates the debt and makes both lyable, though the custom give election to sue one or both of them, and so one may here be sued, for the debt is by the custom transferred upon one, although it be the debt of both. And here both the dayes, viz. according to the old stile, and according to the new were past before the action brought. Roll chief Iustice held, that the Plaintiff ought to have Judgement; but that day shall be taken according to the old stile, if there be not a speciall averment to the contrary, and so there is variance between the pleading, and the verdict; but this doth not hurt here, for the Action doth not fail, although the day be limited upon the evidence, otherwise than it is in the Declaration, for the debt is the duty arising upon the accompt made between the parties, and the day upon the Assumpsit for the payment is not material, for the Action lies though no Assumpsit had been made, and here is no need of an actual promise; But if an Assumpsit be made upon a contract, there is no precedent duty, and so there is a difference between one case and the other. And if two be found in arrearages of accompt, by the custom of Merchants one may be charged to pay all the debt as well as both. Ierman Iustice as Roll, and said, that where the day is part of the contract, it ought to be alleged to be past at the time of the Action brought; but it is not so here, and also both the dayes are here past. Nicholas to the same purpose, Roll chief Iustice, If the Action be specially laid, and the day made part of it, there if the Plaintiff fail in the day, his action also fails. And if one declare generally for 100 l. upon an indebitatus, and it appears upon the evidence, that the Defendant did owe the Plaintiff but 10 l. yet the Plaintiff shall recover; But if the Plaintiff declare specially, viz. for a horse sold for so much, and by the evidence it appears he owed a lesse sum, there the Plaintiff shall not recover, for it shall be intended another contract, and not that, upon which the Action is brought, and so Iudgement for the Plaintiff

Special verdict. Q. whether a variance between the declaration, and the promise on which it was granted.

Date.

Averment.

Time.

Actual promise.

Debt.

Custom.

Declaration. General. Special.

nisi, &c. Maynard spake again to it; But Iudgement was given for the Plaintiff upon the former reasons.

Paul VVilliams and his wife against the Custodes.

Hill 1650. Banc. sup.

Error to reverse a Judgment at the Sessions for speaking words.

PAwl Williams and his wife had a Judgement given against them at the Sessions at Hickes Hall, upon an endictment for speaking words against the Lord Fairefax, whereupon they brought a Writ of Error in this Court to reverse the Judgement. The Exceptions taken were these, 1. That the Iustices there had not power to hold plea for words spoken. To this the Court answered that they have power to hold plea for such words, because they tend to breach of the peace, and the speaking of them is a great misdemenour. The second exception was, that it is said juratores jurati electi triati ad veritatem dicunt, & ad dicendum is left out. 3ly. There issued out a capias pro fine against the parties, whereas there was no fine set upon them. The Court to that answered that a fine was set. Wild took another exception, viz. that the endictment ought not to be joynt against two, for words spoken by them both; but severall endictments, for the words of one are not the words of the other, though they be the same words; But the Court answered, that a joynt endictment was good enough, although a joynt Action of the Case cannot be brought against two, for words spoken by them both. He took also this Exception, that it doth not appear that the parties were tryed in the Court, for it is only said that they were ducti ad barram, and then that they were removed from Hickes Hall to Newgate. The Court answered, that the words ducti ad barram were sufficient, and it is needless to say they were tryed in Court. And therefore the whole matter rests upon the 1. Exception, whether the want of the words ad dicendum be Error, and for that let the Clark of the peace be here on VVednesday next, and then speak again to it, and then by the whole Court the Exception was adjudged good. And the Clark of the peace was fined 40 l.

Endictment.

Case.

Masterman against Rusholme.

Hill. 1650. Banc. sup.

Pasc. 1650. rot. 594.

Error to reverse a judgment in an Action upon an Assumpsit.

A Writ of Error was brought to reverse a Judgement given in an Action upon the Case upon an Assumpsit, to pay Mariners wages, the Exceptions taken were first, that the plaint was for 10 l. and the Declaration is to the damages of 20 l. and so there is variance between the plaint, and the Declaration. Next the promise is said to be made the 1. of May, 1641 to serve the Defendant for a year, and he saith that he served him from the 1. of May for a year, whereas the 1. of May ought to be excluded, so that he ought to say that he served for a year, from the making of the promise. Roll chief Iustice said, that there is variance between the plaint, and the Declaration; but it is helped by the verdict, for that finds that he hath served a whole year. But two other exceptions were taken at the Bar. 1. That the Declaration was pro salore insteed of Salario. And 2ly. It is said deserviret for dedervivit. And upon these the Court ordered the Defendant in the VVrit of error to shew cause why the Iudgement should not be reversed.

Variance.

Error.

Hill

Hill. 1650. Banc. sup.

AN Action upon the Case was brought in London for calling a woman whore, the Defendant removed the cause into this Court, whereupon the Plaintiff moved for a procedendo to try it in London, where the action was first brought. Roll chief Justice held, that a procedendo was to be granted, for we cannot determine the Custom; but if a Judgement be given in London, if it be erroneous, a writ of Error may be brought in the Hustings to try the custom, therefore take a procedendo nisi causa ostensa fuerit in contrarium. Antea. For a Procedendo into London.

Davis against Ockham.

Hill. 1650. Banc. sup.

Mich. 1650. rot. 557.

DAvis brought an Action upon the Case against Ockham for speaking these words of him; The knave the Apothecary that married my sister hath poysoned my Vncle, and I will have him taken up again to hang him. The defendant pleaded an accord betwixt him, and the Plaintiff, that whereas the Plaintiff had done a Trespass against him, that one Trespass should be set against the other. To this plea the Plaintiff demurred, and Twisden said the plea was not good, and cited 16 Ed. 4. f. 89. and prayed Judgement for the Plaintiff. Latch of Councell with the Defendant said that the Accord was executed on the Defendants part, and therefore may be pleaded in Bar. To this Roll chief Iustice answered, how have you discharged the Accord? for you do not shew it. Latch took Exceptions to the Plaintiffs Declaration. 1. That the words set forth are not actionable, for it doth not express that the Plaintiff wittingly poysoned the Defendants Uncle, or that he did dye of the poyson, and cited Hob. rep. 8. Miles and Iacobs case, and 275. Fleetwood and Caveleys case. 2ly. There is no Communication expressed in the Declaration to be of the Uncle, and it may be spoken of another Uncle, and the innuendo will not help it, because he may have divers Uncles. Twisden answered, that it is implyed in the sence of the words, that he poysoned him felonously, and so consequently wittingly. And 2ly. He saith that he will have him digged up, and so it must be intended that he dyed of the poyson. Roll chief Iustice held that the words are actionable. And 2ly. That the Defendants plea in Bar, is not good, Ierman Iustice held the plea in Bar not good; but he doubted whether the Declaration was good, for it doth not appear thereby, whether the party dyed of the poyson, and the latter words help it not. Nicholas Iustice, and Ask Iustice agreed with the Roll in all, and thereupon the rule was Iudicium nisi, Lundi Suivant. Demurrer to a plea in an Action for for words. Bar. Case. Bar.

Custodes, &c against *Maine* and Serjeant.

Hill. 1650. Banc. sup.

A Joynt Enformation was exhibited against Main & Serjeant 2 Iustices of Peace, for not enquiring of a Rpot, and a verdict found against them. Arrest of judgment upon an information found.

The Defendants move in Arrest of Judgement, and by Hales shew for cause that the information ought not to have been joynt against them, but several, because their offences are several and not joynt, and here one of them is acquitted, and so judgement cannot be given against the other that is found guilty. Roll chief Iustice answered, That as an Attachment in a Prohibition is several, so the execution here may be several, and it is not material though one be acquitted, and the other found guilty. Ierman, Nicholas, and Ask Iustices to the same purpose. It was then said, that it is not necessary that the next Iustices only should remove a force, but all the Iustices of the County are bound to it: And these words in the Statute, viz. That the 2 nert Iustices shall do it, are put but for conveniency, and the more speedy execution of Iustice. Nicholas Iustice doubted of this. Judicium nisi, pro custodibus.

Execution.

Force.

Ailet against Watles.

Hill. 1650. Banc. sup.

Trin 1649. rot. 200.

In an Action of Trespass and Ejectment, there was a special verdict found, upon which the case fell out to be this. An Infant bargains and sells land, and is vouched to warranty, and comes in upon the Voucher, and thereupon a common recovery is had, and upon this the question was, whether this be such a recovery, that the Infant cannot avoid by Entry. Hales held it could not be avoided, but did bind the Infant during his life, but I could not hear his reasons. Wild of Counsel on the other side argued, that the Infant was not bound by the recovery, because as an Infant cannot alien his lands, so neither can he suffer a common recovery, and cited 6 rep. 28. 2ly. No record made by an Infant can bind him, and for this he cited 26 Ed. 3. Fitz. per que serv. 24. 41 E. 3. f. 3. 44 E. 3. 10. 9 Ed. 4. 38. and though it be breve Amicabile, and by consent, yet it binds not, and 9 Car. Newports case, where a recovery suffered by a Guardian was adjudged good, comes not to our case; and for the intended value in a recovery, that is not material to make it binding, for it is but a fiction, and not a real value. Roll chief Iustice demanded whether a fine be not breve amicabile; and yet he said that that binds an Infant until it be avoided by writ of Error. And he said that the Infant is not bound here, but the question is whether he can avoid the recovery by Entry, or must bring a writ of Error to avoid it. And he held that a recovery suffered by a Guardian is not good, notwithstanding the opinion in Newports case. Hales replyed, that the recovery here is binding till it be avoided by a writ of Error, and that the Infant cannot avoid it by his Entry, though an Infant may avoid a deed by Entry, although it be enrolled. And here appears no consent of the parties, and the party cannot shew it, and here is a formal judgement given, which binds till it be reversed by a writ of Error. Roll chief Iustice, An Infant may avoid a matter in pais by Entry, but not a matter of Record, and here is a proper way by the law to avoid it, namely by a writ of Error, which is also matter of record, and of as high a nature. Ierman, Nicholas, and Ask Iustices to the same effect, and so judgement pro Defendente, nisi.

Special Verdict in Tresspals and Ejectment.

Fine. Error. Recovery.

Entry.

Powell

Powell against Hopkins.

Hill. 1650. Banc. sup.

Hill. 23 Car. rot. 787.

Error to reverse a judgement given in a Trover and Conversion.

Judgement was given in an Action of Trover and Conversion for the Plaintif: The Defendant brought a writ of Error, and the Exception taken was to the Declaration, wherein the Plaintif among other things declared of a Trover de ducentis ponderibus æris, & ducentis ponderibus plumbi, Anglice of Brass and Lead, and there wants an Anglice for the ponderibus, so it is uncertain what the quantity of either are. And upon this Exception the rule was, that the Judgement should be reversed, nisi, &c.

Denton against Caket.

Hill. 1650. Banc. sup.

Trin. 1650. rot. 150.

Demurrer to a plea in Bar of an Action upon the case for words.

Denton brought an Action upon the Case against Caket for speaking these words, He and his fellows have stollen her (having speech of a Cow of the Defendants) and I do charge him with flat felony: By reason of which words he was taken and imprisoned. The Defendant pleaded an award made (by Sir John Rivers, and Sir Nicholas Miller two Justices of Peace) between the parties in Bar. Twisden of Councel with the Plaintif said, that the award doth not bind the Plaintif, for the award concerns only the speaking of the words, and speaks nothing of the imprisoment: And 2ly. the Award is not good, for there is not satisfaction made by it on both parties. Wild of Councel with the Defendant held, that the Declaration was not good, and that therefore he needs not to justifie the plea; for though it should be ill, yet the Plaintif can have no judgement, and he said the Declaration was naught, because it alleged no day when, nor place where the Defendant charged the Plaintif with the felony, and made him to be imprisoned. Twisden answered that there is a place alleged, and that though there were none, yet it is well enough for part, and judgement may be given for that. To which Roll chief Justice agréed. Wild replyed, then the plea is good. But the Court answered, it is not, and what say you to the Arbitrement? Wild answered, it was good, to which Terman and Ask Justices assented. Roll chief Justice answered, It is a benefit to the Parish; and so to the Overseers of the poor. Nicholas Justice to the same purpose. Roll chief Justice said, that the Declaration is ill, and the Plea also, for the Plea is entire, and yet goes not to all the matter alleged in the Declaration, but the plea is only to part of them, and therefore if any part of the Declaration be good, judgement ought to be given against the Defendant for that part, and the plea in Bar is naught, so judgement ought to be entirely for the Plaintif. But it is to be considered concerning the damages.

Declaration, Plea.

Ro:

Rosyer against Langdale.

Hill. 1650. Banc. sup.

Pasch. 1650. rot. 100.

Error to reverse a judgement in an Assumpsit by an Executor against an Administratrix.

ROsyer an Executor brought an Action upon the Case upon an Assumpsit against Langdale a Feme Administratrix, and declares that the Defendant, in consideration that he would forbear sute until she had taken out Letters of Administration, did assume and promise to pay unto him the Plaintif a certain sum of money owing unto him by the Intestate. Upon Issue joyned, and a Verdict and a Judgement for the Plaintif, The Defendant brought a writ of Error to reverse the Judgement. And Baldwin of his Counsel took these Exceptions. 1. That the Plaintif had set forth no consideration in his Declaration for the Assumpsit; for all that is alleged is, that the Plaintif should forbear sute till the Defendant had taken out Letters of Administration, which is no consideration at all, for the Defendant was not lyable to be sued as Administratrix, until she had taken out Letters of Administration, except there were a cause depending, as here is not. And he cited Hob. rep. Bidwell and Cottons case, That if there be a sute commenced, though there be no cause for it, yet forbearance to sue is a good cause to ground an Assumpsit upon. A second Exception was that the Venire facias is not awarded per Curiam, nec in Curia. Roll chief Iustice held the 1. a good Exception, for the Defendant was not chargeable before Letters of Administration taken forth, if she do not intermedle with the goods of the Intestate, and it doth not appear here that she did, neither is the Defendant compellable to take forth Letters of Administration, for they may be granted to the next of kin if the Ordinary pleaseth, according as the Statute ordains. Ierman, Nicholas, and Ask Iustices to the same intent, thereupon the rule was reverletur, nisi, &c. But because Day being of Counsel on the other side took some Exceptions to the writ of Error and the return thereof, It was adjourned.

Assumpsit.

Staples.

Hill. 1650. Banc. sup.

For a Supersedeas to a Scire facias.

THe Court was moved to supersede a scire facias brought by a prisoner of the Marshalsea, upon the late Act for discharging of poor prisoners, because the Certificate of the cause for which he was a prisoner was false, and so the proceedings erronious, for the party was in execution for Trespass, which is not within the Statute made for the prisoners. 2ly. Because there was no due notice given to the party, at whose sute he lay in execution, as the Statute doth direct there should. The Court ordered to view the Certificate, and to file it; otherwise there should be no proceedings upon the scire facias, and directed the party to demur upon the scire facias, if it be not good, because the matter alleged cannot be pleaded to it.

File. Demurrer.

Custodes.

Cuſtodes againſt Arskot.

Hill. 1650. Banc. ſup.

MAynard moved the Court for one Arskot that was outlawed for murther, and had leave to bring his writ of Error, that he may have longer time to bring it, becauſe the King uſes to ſign the writ, and the Parliament had not ordered who ſhall do it now, and therefore the Attorney General muſt adviſe with the Parliament about it, which cannot ſpeedily be done, Thereupon time was granted till the Attorney could conveniently do it. For time to bring a Writ of Error.

Newcomin againſt Leigh.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 52.

LEigh did aſſume and promiſe unto Newcomin, that if Newcomin would take one Loe for his Debtor, in the room of one Cooper, and would ſpare Loe until ſuch a time for the money, that then he would pay the money to Newcomin, if he did not, and upon this Aſſumpſit Newcomin brought his Action againſt Leigh. The queſtion was whether this were a good Aſſumpſit. And the Court held it was not, becauſe it is a collateral thing, and he doth not ſay that he will diſcharge Cooper, and ſo Newcomin may ſue Cooper notwithſtanding the Aſſumpſit; For though it may be it was the intention of the parties to diſcharge Cooper, yet it appears not ſo by the words of the Aſſumpſit ſet forth: And it was then ſaid by Roll, That if I promiſe to pay to John a Down a Debt which John a Stile oweth to John a Down; this is nudum pactum. Whether a good Aſſumpſit. Nudum pactum.

Bawſy and Lowdall.

Hill. 1650. Banc. ſup.

Paſch. 1650. rot. 275.

UPon a ſpecial verdict in an Action of Treſpaſſe and Ejectment, the caſe in effect was this. A man ſeiſed of Copyhold lands in fee, deviſable by Cuſtom, deviſeth them in this manner, I give and bequeath my lands, &c. to my ſon Richard, during his natural life, and after to the heir of his body for ever. Hales of Counſel with the Plaintif made theſe queſtions, 1. whether by the words of the Will a Fee-ſimple at the Common Law paſſeth becauſe there is an eſtate to Richard for life, and after to his heir in the ſingular number. And he argued that the word heir includes heirs, becauſe it is Nomen Collectivum: Next, Whether the deviſing the land to Richard for his natural life, and after to his heir for ever, makes any difference in the Caſe, and he held it did not, and ſaid, that Archers caſe that is objected by the other ſide differs much from this, for there the words are reſtrained; for it is Proximo Hæredi, and not Hæredi generally, as it is in our Caſe; and there the words next heir are not words of limitation, but of purchaſe, and to Special Verdict upon the deviſe of a Copyhold in Fee.

decipher the person, but not to limit the estate; and in our case if there should not be a limitation, Richard should only take for life, which is not the intent of the Will, as may appear by the passages, and clauses of it. And Thomas and Kemishes case, in 5 Car. in this Court makes an end of our Case. Neither doth the adding of the word in perpetuum make a difference in the Case, for if the words had been omitted, the same estate had passed to the Tenant, Richard and his Estate is not enlarged by them. 2ly. The words in perpetuum relate to all the Estate, and not to any particular Estate, and so the surrender made by R. Hunt is good. Next of all, supposing that it be a limited Estate, and a contingent remainder, the question will then be whether this contingent remainder be destroyed or no, and I conceive it is, because the particular Copyhold estate, which must support this contingent remainder is destroyed, and the Law is the same in that point in Copyhold cases, as it is in other cases at the Common Law, for Copyholds are directed by the rules of the Common Law, 13 Iac. Banc. Reg. It is also held, that there is the same rule to support a contingent remainder of a Copyhold as there is of Land at the Common Law. Next it is to be considered whether the particular Copyhold estate, be extinguished or not. And it is clear that it is, for the customary Estate is in the Lord who hath the Fee simple, which cannot both stand together, and so there is no estate to support the contingent remainder Copyhold, and consequently all objections are by this answered. 1. That the surrender shall not do wrong. 2ly. That the surrender destroys not the Custom. Turner on the other side argued, that only an estate passeth to Richard for life, and that the word Heir is not a word of limitation, to make the Ancestor take a Fee simple, neither shall the word Heir be taken Collective here but singulariter, and so according to the common sence, number, and matter ought it to be construed. And Nowns Collective in the singular number do not signifie the same thing, that they do in the plurall number, as may be proved by other examples, and there is no proper name to signifie one particular Heir in Law, if the word Heir in the singular number shall not do it, Shellyes case, 1. Rep. f. 101. & Cooks Institut. f. 8. 1. Rep. Archers case. And there are two Judgements in the Common pleas in the very point, as I am informed by the Attorney on our side. In a Will the word Heir shall not be taken Collective; but in the natural grammaticall sence, and not as a word of art; but it is otherwise taken perchance in conveyances, which are made by men of Art, and learned in the Laws, whereas wills are made commonly by lay gents, and unskilfull in the Law; And the rule is, that words shall be interpreted to make all the parts of a deed in which they are to stand together, and to bear sence and to be in esse, and effectual, which cannot be here if the word heir shall be taken Collective; but may be if it be taken singulariter. Hob. rep. Stukely and Butlers case. Next if the word heir should be taken Collective, then the Estate for life would merge, 20 El. C. B. Hill. 3 Iac. C. B. Hiller and Lewis his case. 3ly. Rich. hath only an Estate for life, if it were otherwise the Testator would have otherwise expressed it and he hath well expressed an estate for life, and no other Estate in him. If one grant 4. parts of his manor, it shall passe 4. parts of 5. and not all. For the other point the contingent remainder is not here destroyed by the destruction of the Copyhold Estate, for Copyhold Estates do not depend one upon another, as Estates of the Common Law do, and here is one in esse to take the Estate. Another question he spoke to, viz. whether a Lessee at will being ousted by a stranger can reenter, and he held he cannot, for he hath but a meer right, 38 H. 6. f. 27. Fortescue and Yelverton, 3. Iac. Banc. Reg. rot. 501. Carpenter and Collins. But to this Roll chief Iustice, and Nicholas Iustice answered, that he may enter notwithstanding it

Entry.

hath

hath been heretofore controverted, and the reason is, because he hath the primer possession. Roll chief Iustice enclined that the contingent remainder is not destroyed, because it doth not here depend upon the particular Estate; but it ought to expect till the remainder happen; and he conceived that the word heir, and heirs, were all one here by the intent of the partyes, and the frame of the conveyance. Ask Iustice said, that it is a good Estate of Fee simple conditionall executed in Richard. Ierman Iustice, The intent in a Will, if it be not contrary to Law, ought to be taken, and there must be words to make the intent appear, and these words must stand together, and shall not be made void, and he conceived the contingent remainder not destroyed. Adjourned still the next Term. Postea.

Port against Midleton.

Hill. 1650. Banc. sup.

A Writt of Error was brought to reverse a Judgement given in an Action of debt upon an obligation, and the Error insisted upon was in the entring of the Judgement, which was quod recuperet Debitum suum, and doth not say prædictum. Roll chief Iustice answered, that the debt is confessed by the party, and the question is, whether the deed was delivered as an escrow or not; but it was delivered to the party himself, and therefore could not be delivered as an escrow. Ierman Iustice said, that debitum suum without prædictum is not good, for the word prædictum is verbum operativum. Ask Iustice as Roll, and there is but one debt, and the word ideo in the record implyes it to be the same debt. Nicholas to the same effect. The rule was affirmetur nisi causa die lunæ sequenti.

Error to reverse a judgment in debt

Delivery.

Escrow.

Implication.

Hill. 1650. Banc. sup.

AN administrator had a Judgement against one to recover a debt due to the Intestate, and then the Administrator dyed Intestate, and another took out new letters of administration de bonis non of the first Intestate, and after moved the Court that he might have a scire facias to revive the Judgment obteined by the former Administrator. But the Court answered, that he could not have it; but must begin a new Action, for the debt against the party.

For a scire facias to revive a judgement denyed.

Scire facias.

Hill. 1650. Banc. sup.

ONe was endicted for speaking these words against a Major of a City, viz. you are a forsworn man, and have broken your oath. Hales moved to quash the endictment, because the words have no reference to the Major in respect of his office. Ierman Iustice answered, that the speaking of the words is a breach of the good behaviour, and thought it fit the Defendant should plead to the endictment, to which the Court at first enclined. But afterwards ruled the other party to shew cause on Monday following why it should not be quashed.

To quash an endictment.

The Counteſſe Rivers caſe.

Hil. 1650. Banc. ſup.

Arguments touching privilege of peerage not to be arreſted.

THe Counteſſe Rivers was arreſted by a bill of Midleſex, and prayes in Court by her Councell that the Writ may abate, and the Precept, and pleads her patent, whereby ſhe was created a Counteſſe, and ſo pleads that ſhe ought not to be arreſted. Latch of Councell againſt the Counteſſe argued that her patent was not good, becauſe it wants the words of inveſtiture, which are materiall words in the making of an Earl or Counteſſe, for although the Act of inveſtiture may be omitted, becauſe ſhe is a woman and ſhe cannot be girt with a ſword, yet ſhe may be cloathed with a mantle, as it is in the Inſtitutes, f. 16. 6. and ſo was it in the caſe of Ann Bullein that was made Marchioneſs of Wincheſter by King Henry the 8. and of the Lady Finch, made Counteſſe of Winchelſea by King Iames, 6 Iac. Paſch. 1. but in this Caſe there was a non obſtante, to diſpence with the clauſe of inveſtiture, and in the Viſcount Barkleys caſe, the patent whereby he was made Earl of Nottingham was adjudged naught, for want of this clauſe. 2ly. It doth not appear by the patent, that ſhe is made an Engliſh Counteſs, and then ſhe hath no privilege, 8 Rich. 2. Banc. Reg. 204. 11 E. 3. Banc. re. 473. Neither is there any relation to the patent to any place, of which ſhe is made a Counteſs. For although the patent be ſealed with the Engliſh broad Seal, this is not materiall, for outlandiſh honours may be granted by the broad Seal of England. 3ly. The cauſe that ſhe ſhall have privilege of an Engliſh Counteſſe is not material, becauſe ſhe is not made an Engliſh Counteſs, and ſhe is no Counteſs to have privilege againſt the Common Law, although ſhe may (it may be) have her privilege in point of honour in the Marſhalls Court and Heralds office, becauſe there is no publique good and ſervice in making her a Counteſs, 43 E. 3. 4. for being a woman ſhe cannot be imployed in Arms, or otherwiſe for the publique. And an Embaſſador cannot have privileges granted him, which do not concern him as an Embaſſador, Dyer 60. and 11 H. 7. rot. 24 C. Banc. The King cannot grant one to be exempted from arreſting, as it is in Cooks Mag. Char. Paſc. 7 H. 8. rot. 66 C. B. for the reaſon of that clauſe of Magna charta nulli negabimus Iuſticiam. The King cannot grant a Sanctuary to protect men from the arreſts of his ſubjects, 29 Aſſ. 34. Keiw. 190. And there is no inſtance to be given of a woman made a Counteſs, that was ever free and protected from arreſting. In the Statute of 20 H. 6. C. 9. for Earls wives, and 21 H. 8. to qualifie Chaplains, there is no notice taken of Counteſſes by creation, but only of Counteſſes dowagers, or Counteſſes by deſcent. 6 rep. 63. C. de Rutlands caſe, and Ann Bullein was tryed per pares as ſhe was Queen, and not as ſhe was Marchioneſs of Wincheſter. And further the privileges of Earls and Counteſſes are now extinct, for the cauſe of thoſe privileges, viz. the King and houſe of Lords are extinct, and gone, and the privilege of being free from arreſts is a privilege executory, and not executed. Neither doth the ſufficiency of their poſſeſſions only give them the privilege not to be arreſted; but their publique ſervices to the State, which is the final cauſe of the privilege, and the other was but a partiall cauſe, and not the ſole cauſe. Reliefs were payed by Barons and Earls, when Earldoms and Baronies were created; but they are not now payed as they were then, but according to the value of the poſſeſſions now, and Amerciements of Earls and Barons were equall. The privileges of Earls and Barons was derived originally from Soldiers, after it was derived to Biſhops, and great Counſellors, and ſo it appears that they were

were priviledged in respect of publique imployments, and not by reason of their revenues. All the Abbots and Priors had the priviledge not to be arrested, yet all were not Lords of the Parliament, 21 E. 3. Mich. 59. Tres. Mich. 7 H. 7. pl. 7. 31 E. 3 proces. 54. 27 H. 8. 7. 7 H. 6. 11. 29 E. 3. f. 30. Dyer 315. And a Judgement without a Capiatur was in Trespass against a Bishop, because the King was to have no fine, 14 H. 7. 21. But it is not so in a temporall peer, where the King is to have a fine. The priviledges have severall expressions, and the reasons for the priviledges of the lay peerage is fully expressed in the Writs directed to them, Regist. 287. 247. Rast. Exigent. Britton 88. 10 H. 4. 15. per Hull. 14 H. 6. 2. per Newton. 39 E. 3. f. 35. Hill. 14 Eliz. Dyer 314. 3 H 6. f. 38. 48 E. 3. f. 3. 35 H. 6. 46. for other priviledges they are not allowable: And now also all tenures as well as the House of Lords is taken away by the late Act; and though her priviledge do continue, yet she hath not taken the right way to have it allowed; for she ought to have brought a writ out of the Chancery to have it allowed, and not to have done it by a dilatory plea, 8 H. 6. 9 & 10. and the Patent cannot try whether she be a Countess or not, 9 rep. 31 Inst. 16 b. 6 rep. 63. And lastly mischief and misery will ensue to many, if this priviledge should be allowed, and the very matter speaks for it self, and so he prayed judgement for the Plaintif. Hales of Counsel on the other side prayed the priviledge might be allowed, and he followed Latch in the points of this Argument: And first he said, that the thing grounded by the Patent is only in creation of the dignity, and there is no need here of Investiture, for if there were, then a recital of it should be also necessary, but because it needs not, therefore it needs no recital of it in the Patent. Seldens Tit. of honour, f. 876. 21 R. 2. There is a recital of an Investiture, but there was no Investiture, and so it was not material, and a non obstante is to no purpose to dispence with the want of Investiture, if it were necessary, and the reason of the making the new Patent of the Lord Barkeley was not for the want of the Clause of Investiture, for the Investiture is a ceremony of the Heraulds, and not essential to the Honour. And although there be no certain place of denomination of the place of the Earldom, yet is the Patent good, for it may be out of England, and yet she may be an English Countess notwithstanding, Although I agree that forein honours may be granted by the Broad Seal of England; but here be sufficient words to express her to be an English Countess, & the most proper that can be, viz. the Patent. Creations of such honours have been frequent, & she hath also a sufficient estate to support her dignity: I confess that it is true that no person can be priviledged from Arrest by grant; but here the priviledge ensues the Patent of her Countesship by Custom and Law, as incident to it. The King cannot grant a priviledge to imprison, but if he grant a Court, the power to imprison follows necessarily upon it; And the priviledge which the Law gives to the person of a Countess, is that which exempts her from Arrest, as it appears in the Case of a Countess by Mariage, and a Countess by Creation is more honourable than a Countess by Mariage; and therefore ought to have as high priviledges as the other; and the Statute made concerning Countesses, the wives of Earls and Barons do appertain to a Countess created; for those Statutes were but an affirmance of the Common Law, and did introduce no new Law. This priviledge is not taken away, for it arose by Custom and by the Common Law, and not from Forreiners, as Latch conceives, and so the reason of that cannot be as he urgeth, but by the priviledge of the person which indures as well when there is no Parliament, as when there is, and this priviledge is during life, and not like to a priviledge granted by reason of employment. For a Countess

Dowager hath no more reason to be privileged, in relation to military employment than a Countess by Creation, and by the late Act no employment is taken away; And for the Clergy they were privileged from Arrests, not because of employment, but by reason of the eminency of their persons. There may be an Earl or a Baron by writ or by prescription, and there it ought to be certified by writ; but here the honour being by Creation, the Patent may be pleaded to certifie it, as well as if it were certified by writ, and to plead it thus is the more proper way. A Baron ought not to be stiled Dominus in a writ, but by his Christian name, and addition of Knight, if he be one, if he have no special name of Barony in his Creation. Roll chief Justice demanded, if one be made a Baron, and be not called to the Parliament by writ, or comes thither by virtue of some clause in his Patent, shall he be exempted from Arrest? quasi diceret non. And if one heretofore had had twenty Knights fees, could he have come to the Parliament by reason of them? And held that the privilege is not allowable, for she never had reference to the Parliament, or to do any other publique service. Ierman, Nicholas, and Ask Justices agreed with Roll in all. Roll said, If the King grant a Town to be a Burrough, the grant gives it not privilege to send a Burgess to the Parliament, except there be special words in the Patent to warrant it; but if he make a County it is otherwise by Statute. Adjourned.

Privilege.

Hayward against VVilliams

Hill 1650. Banc. sup.

Hill. 1649. rot. 824.

Whether a Writ of Error well brought.

THe Case was this, A Feme was sued as a Feme sole, but by the surname of her Husband, she being Covert Baron, and Judgement was given against her, and the Baron brought a writ of Error. The question was, whether the writ of Error was well brought by the Baron. It was then said, That if a Feme Covert levy a fine as a Feme sole, if her Baron die she shall not defeat it, but the Baron may defeat it during her life. Roll chief Justice to the case at the Bar said, how can the Baron bring a writ of Error here, who is no party to the Record, neither is chargeable by the judgement? But let us see books, for the case is considerable. Postea, *280*.

18 E. 4. 40. 7.

Needler and Guest.

Hill. 1650. Banc. sup.

Trin. 1649. rot. Q.

Whether Execution may be notwithstanding a Writ of Error brought in the Chequer Chamber. Execution.

A Writ of Error was brought in the Chequer Chamber to reverse a judgement given in this Court. The question was, whether now, since the late Act, that a Writ of Error shall be no supersedeas of Execution, this Court may grant execution. Roll chief Justice said, it may, for otherwise the Act is to no purpose. Latch said, the Record is not now in this Court, and therefore there can be no Execution granted here. Roll chief Justice answered, you have confessed by your pleading, namely by your Demurrer, that the Record is here so far as to grant Execution. Therefore let there be Execution, except cause be shewed to the contrary the

Saturday

day the next term. But afterwards the Court said, they would not grant it, but said the party might take execution at his peril.

and Alleyn.

Hill. 1650. Banc. sup.

A Certiorari was directed to the County Palatine of Chester to remove a cause into this Court. They make a special return, viz. that they have jurisdiction of the cause, and that therefore they are not to certifie it. Serjeant Glyn argued, that this return was not good, for this Court hath jurisdiction over all the Courts in England in writs mandatory, 34 Ass. 7. 19 H. 6. 12. And an Act of Parliament doth not take away the power of this Court, if it run not in the negative; but in writs remedial it is not so general as it is in this case, & the cause may be well enough tryed here, notwithstanding it be concerning a matter which ariseth in the County Palatine, as the Statute 9 Ed. 3. C. 6. is. 2ly. It appears that the Major and Citizens of Chester are parties, and so they will try their own cause, and this appears by the Record, and this they ought not to do, 21 H. 7. f. 33. lib. Ass. 332. 37 E. 3. f. 7. 6 Iac. C. Banc. and Smith and Hancocks case, 23 Car. Banc. Reg. Roll chief Justice answered, If the cause were come to tryal this were good cause to remove it, but it is not so here. and it appears not by the return that the matter of the fute did arise within the jurisdiction of the City, what say you to that? for they have not shewn any cause why they should have jurisdiction. Therefore let them shew cause before the end of the Term, upon notice, why they should not make a better return. Roll said, the Action may be well brought there, although they cannot try it there, for the Original is good.

Whether a Return good out of the County Palatine of Chester.

Jurisdiction.

Return.

Tryal.

Shurlye against Semaign.

Hill. 1650. Banc. sup.

The Court was moved upon an Affidavit that two writs of Execution were executed upon one Judgement, therefore it was prayed that the last execution might be superseded, because there ought not to be two executions for one matter, but where the party is prejudiced by death, or Act of Law, that the party cannot take benefit of the former execution, 28 H. 8. Dyer, and 13 Eliz. Dyer. Roll chief Justice, If the first writ of Execution be returned and filed, there cannot be a second Execution, otherwise it is if it be not returned and filed. Therefore take your Course.

For a supersedeas to an Execution.

Execution.

Coleman against Blunden.

Hill. 1650. Banc. sup.

[Mich. 1650. rot. 447.

Coleman brought an Action upon the case upon an Assumpsit against Blunden, and had a verdict against him; In Arrest of Judgement it was moved that it doth not appear by the Declaration to whom the Assumpsit was made, but it only says super se assumpsit, and upon this Exception The Court ruled a nil capiat per billam.

Arrest of Judgement in an Action upon the Case.

Warry

VVarry against Bond.

Pasch. 1651. Banc. sup.

Arrest of Judgement in debt upon a Bond to stand to an Award

IT was moved in Arrest of Judgement in an Action of Debt brought upon an Obligation to stand to an Award, that the submission to stand to the Award was conditional, viz. so that the Award were delivered up the 27 day of such a Month: And it appears that the Action brought is for not performing an Award made the 24 day of the same Month; so it appears not whether the Award were delivered upon the 27 day, or no, and so it may be that the condition is not broken. Roll chief Justice answered, the question is whether it be an Award before the delivering it up or no. There-

Award.

fore let the Judgement stay till the Plaintif move, for it is worthy of Consideration.

Harman against Iacob.

Pasch. 1651. Banc. sup.

Arrest of Judgement upon an Endictment.

IN an Arrest of Judgement upon a verdict given against an Alien in an Endictment upon the Statute of 22 H. 8. C. 13. for using a Trade, exception was first taken, that the Endictment doth not say that the Defendant was born out of the power of the Common-wealth, but only that he was born out of England. To this Roll chief Justice answered, if it say

Alien.

that he is Alienigenus, that employes all. 2ly. The Endictment doth not say that he is Alienatus extra Angliam, and this was held a good Exception.

Sir Humphry Tracye against Bloom.

Pasch. 1651. Banc. sup.

Arrest of Judgement in Debt for Rent.

IN Arrest of Judgement upon a Verdict given in an Action of Debt for rent upon two leases, one for years, and the other at will, The Exception taken was that the Plaintif declares upon a demise made to the Defendant the 7th. of October 1646 at will, and sets forth that the Defendant held the lands let for 2 years, ending at Michaelmas 1648. and so for two years rent behind he brings his Action, whereas there cannot be such a rent due for such a Term; for although the rent be due for the whole year at Michaelmas, yet the term of 2 years is not ended at Michaelmas, for that is upon the 29 day of September, whereas the 2 years end not till the 6 of October following. Roll chief Justice answered, the rent for the 2 years was

Rent.

due at Michaelmas, and take all the words together the Declaration is good enough, although the expression be not so proper as it might have been, Nicholas and Ask as Roll, and so the rule was judicium nisi.

Shann and Shann.

Pasch. 1651. Banc. sup.

Arrest of Judgement in an Action upon an Assumpsit.

SHann brought an Action upon the Case upon an Assumpsit against Shann, and declares, That in Consideration that the Plaintif would surrender

to

to the Defendant, and his heirs, a Copphold according to the custom of the manor, the Defendant did assume and promise unto the Plaintiff to pay unto him 500 l. and for breach of this promise he brought his Action, and obtains a verdict against the Defendant. The Defendant moved in arrest of Judgement, and took this exception, viz. that the consideration on the Plaintiffs part was not performed, for the consideration was, that he should surrender the Copphold to the Defendant, and his Heirs, and he hath set forth the surrender to be into the hands of a Copphold Tenant of the manor to the use of the Defendant, which is no surrender, untill it be presented at the next Court, and so it is incertain, whether it shall take effect or no. Roll chief Justice said, It is expressed to be secundum consuetudinem manerii, yet this is not sufficient, for it is not an effectual surrender untill it be presented at the Court. Therefore let Judgement stay till the Plaintiff move. Surrender.

Lord Mont-Eagle.

Pasc. 1951. Banc. sup.

The Lord Mont-Eagle was arrested by a bill of Midlesex, and for want of bail was turned over to the Marschal of this Court, and being in Custodia Marescballi, the Plaintiff declares against him in Debt upon an obligation. The Defendant pleads his peerage, and prayes to be discharged. The Court was moved that he might be ordered to plead in chief, and not this dilatory plea. The Court thereupon ordered that he should shew cause, why he should not plead in chief, and said his plea was dilatory; and so it had been ruled lately in the case of the Earl Rivers. For the Defendant to plead in chief. Plea dilatory.

Fielder and Tovye.

Hill. 1650. Banc. sup.

Pasc. 1651. rot. 430.

Fielder brought an Action of debt upon an obligation, the Defendant prayed Oyer of the Bond, and upon view thereof demurs to the Plaintiffs Declaration, and for cause shews that the Plaintiff declares for quadragint. libris, and the Bond is quadragent libris, and so there is a variance. To this it was answered by Green, that this is no material difference, for the words sound alike, and there is more difference between dra and drin than between ginta and genta, & between dra & drin hath been held no materiall variance, and quadragent. is not utterly incertain here, for either it must be 40. or 400, and the condition of the obligation explains the sum, and the Plaintiff here declares but for 40 l. and so it appears in the Record. In Osbornes case octogenta was for octogint. and yet held good, and Hob. 16. Logards case Trigintat instead of triginti, and in Walter and Pigots case Septingent. is used for septuagent. and Pary and Dayes case quinquegent. for quinquagint. and these held no materiall variances. Latch on the other side said the word in the Bond is uncertain, and the condition hath nothing in it, to reduce it to a certain signification, and if it make any certainty in it it must make it signifie 400 l. and then the Plaintiff hath failed in his Declaration, and Hobarts case differs from this, and as for Osborns case it is variously reported, and so not to be relyed on. Roll chief Justice, What say you to sessanta? But the question here is, what shall be meant by the word whether 40. or 400. And in Fitzherberts case, Judgement was gi- Demurrer to a Declaration in debt upon an obligation.

Variance. ben upon a demurrer, that gent for gint was a material variance, and our case is all one with that. If the doubt be whether it should be 40. or 400. how shall we know the intent of the partyes? and if it be certain it must be understood 400. and the Action is brought but for 40. l. 44 Eliz. Mich. rot. 1301. Gray and Davis case, Sexgint. was adjudged to be a Bond of 60 l. and not of 600 l. And it is the gent. and gint. in all the cases that makes the difference. And the case of sessanta comes not to our case, and so concluded Judgement to be against the Plaintiff. Jerman Nicholas, and Ask Justices of the same opinion. Nicholas Justice said, that false Latin in a Bond doth not make it naught; but he held this Bond was for 400 l. and not 40 l. and it is not incertain for the grammar rule, ginta notat decem, sed genta numero centum, doth hold here. Antea.

Gay against Gay.

Pasc. 1651. Banc. sup.

Trin. 1650. rot. 1350.

Whether an estate tail or fee conditionall. Upon a speciall verdict found in a replevin; The case was this, A man seised of a Copphold Borough English, devised it to H. his grandchild, and to his Heirs, and if he dye during the life of his mother, the remainder to H. his younger brother, and to his heirs. The question here was whether here be an Estate tail in H. or a Fee simple executory. If it be an Estate tail, then the devise was said not good, because it is of a Copphold, but if it be a Feesimple, then it is a good devise. Roll chief Justice said, that a limitation of an inheritance after an absolute Fee simple is not a good limitation, for this would be to make a perpetuity, which the Law will not admit, but if it be upon a contingent Fee simple it is otherwise. Adjournatur. Postea.

Limitation.

Perpetuity.

Heale against Greene.

Pasc. 1651. Banc. sup.

Hill. 649 rot. 370.

Case upon a special verdict in tresp. and ejectment. In an Action of Trespass, and ejectment, upon a speciall verdict found, the case moved to be this. A man seised of a manor that had divers Tenants that held for lives by old rents deviseth it to his wife, during her life, with power to let and set, and make estates out of them, in as ample maner as the Testator might, if he were living. The questions were made by Latch. 1. Whether this power given her to set, and let, &c. doth not alter her Estate for life in the Lands devised to her. 2ly. Whether this power given her by the Will, adds any power to her estate for life, to make estates, and he held for the first, that the power given her, did not alter her Estate. And 2ly. that it adds no power unto her Estate, because the clause in the Will, is one entire clause, and not double and accumulative, and so she can make no greater Estates, than her estate for life will bear. And for the objection that is made, That then the words that limit the power to her are void, and idle. He answered, that it is not necessary that all the words in a Will should give something; but some words may be explanatory of other words, and so are these words here, and yet the words

words here may add ſomething to her Eſtate, viz. to enable her to make Eſtates without impeachment of waſte. And the words ſhall not be intended of the time of Execution of the Eſtates made by the Feme, for then they are idle, Hill. 1 Car. Banc. Reg. Danyel and Vplins caſe. One may diſpoſe an eſtate by Will for life, with power to make Eſtates to continue after the death of the party that made them. But here the eſtate is made only out of the intereſt of the wife, which cannot endure after her life, Paſc. 44 Eliz. Bible and Dringhouſe, and ſo prayes Judgement for the Plaintiff. Hales for the Defendant made theſe queſtions, 1. What power was given by the Will; 2ly. Whether it were well executed; and he held the feme being executrix hath but an Eſtate for life; But ſhe hath a power to make eſtates, as ſhe hath done. There is no queſtion but ſuch a power may be added. The queſtion only is if this power be added here in our caſe, and he ſaid it was added by the expreſs words of the will, for elſe thoſe words are frivolous, and operate nothing. In Danyel and Vplins caſe cited, which was entred, 20 Iac. Hill. 720. there is no expreſs Eſtate given to the party, but a meer power only, and it was not by reaſon of the words added, for they are only confunctive words. And Iuſtice Whitlock held there that the firſt words gave the power; Though Iuſtice Iones differed in opinion, and that caſe is the very ſame with ours; The reaſon in our caſe, That the words give power to the feme, may appear by the comparing this part of the Will with the other parts of it. In other parts of the Will where things are deviſed to his wife, theſe words here uſed are not added, and that argues that the Teſtator intended the Feme more power, than in other things deviſed to her, and the words themſelves being a deviſe of a manor, proved by the nature of the thing, that the Teſtator intended to give power to the Feme, to make Eſtates out of the manor, And it cannot be intended, that the words In as ample maner, &c, do only give the feme power to aſſign over her term, Vaughan and Longs caſe, 24 C. the words were adjudged to be words to enlarge the power of the Legatee, and ſo are they here. And the ſubſequent clauſe during the term of her life, reſtrains not the power, for theſe words may be either referred to the Eſtates to be made, or to the time of making them, and here they are referred to the execution of the power, and this is more ſuitable to the intention of the party in ordinary reaſon, and they are added to expound the intent, viz. that the remainder limited over ſhall not hinder the feme, for he hath not barred her out, and hath impoſed this truſt in her as Executrix, and as Legatee. And for the 2d. point here is a good Execution of the power, for it ariſeth partly out of her intereſt, and partly out of her Authority, and both may well ſtand together, and the Eſtate made out of both is a good Eſtate, or if not, the Eſtate may be intended to ariſe out of the power given her to make ſuch an Eſtate, and not out of her intereſt, and the joyning of her daughter is not materiall, though no good eſtate be derived from her, and ſo he prayed Judgement for the Defendant. Roll chief Iuſtice, It is uſual in the Weſt of England to make Eſtates for lives upon the old rent; but it is not here expreſſed of what nature this manor is, or whether it uſed to be let, and here is no limitation to let for lives. But here either the latter words are idle, or elſe the Feme hath ſuch a power, that ſhe may deſtroy the remainder. And itſh all not be intended that he truſted his Executrix with more than he gave her, and the words of the Will do not expreſs that, and the queſtion is how it ſhall be interpreted. The words may be interpreted Cumulative, otherwiſe the feme hath power to deſtroy the remainder, which would be a hard conſtruction. To which Nicholas aſſented. Roll chief Iuſtie, The intention of the Teſtator is not cleer to give this power to the Feme; but if it did appear to be his meaning, it might be otherwiſe; and here it is in a Will. And Interpretation.

the Verdict is not well drawn up, for the Case might have been made better; for all the land may be in Demesne for ought appears by the Verdict. Adjourned to be argued again, Postea.

VVebb against Wilmer.

Pasch. 1651. Banc. sup.

Hill. 1650. rot. 309.

Arrest of Judgement in Debt for rent reserved upon a Lease for years.

VVebb brought an Action of Debt for rent reserved by him upon a lease for years made to Wilmer, and obtains a Verdict. The Defendant moved in Arrest of Judgement, and alleged for cause that the Plaintif had abated his writ. The case was this, Webb leaseth certain lands to Wilmer for years, reserving a rent, with a clause of re-entry for not payment, the rent being behind, the Lessor brings an Action of Debt for the rent, and pending the sute re-enters into the land, and after the Lessee re-enters. The question here was, whether the writ once abated by the Plaintifs entry, pending the writ, were revived by the Defendants re-entry. Roll chief Iustice held it was not. Twisden argued, that the writ is not abated, but only abatable by plea, and so this matter is not to be offered to stay the Judgement, 5 H. 7. f. 47. and he hath pleaded nothing in abatement, but to the Action only, and he said that it now being after a verdict, it is helped by the Statute. Hales on the other side said, that it doth here appear that the Plaintif hath no cause of Action, for he was in possession when he brought the Ejectment. Roll answered, If one declare having no cause of Action, if there be cause afterward, it is well enough. But here is a departure, and the 1. Ejectment is not revived, for it is purged by the re entry. The rule was nil capiat per billam, nisi.

Reviver. Abatement.

Declaration. Departure.

The Custodes Libertatis, &c. against Hall.

Pasch. 1651. Banc. sup.

Error to reverse a judgment upon an Endictment for forestalling.

HAll was endicted for forestalling of Butter, and pleaded, and had judgement given against him; whereupon he brought his writ of Error, and took these exceptions. 1. That it doth not appear that the Endictment was at the Quarter Sessions, as it ought to be by the Statute of 5 Ed. 6. for it is only said to be ad generalem Sessionem. Roll chief Iustice answered, if it be ad generalem Sessionem it may be intended the Quarter Sessions. 2ly It was objected that there is no Capiatur awarded in the judgement, as there ought to be. The Court answered they would advise.

Intendment.

VVillis against Bond.

Pasch. 1651. Banc. sup.

Mich. 1650. rot. 86.

Error to reverse a judgement in debt. Iurisdiction.

BOnd an Administrator brought an Action of Debt in Bristow against Willis upon an indebitatus assumpsit, and had a judgement: The Defendant brought a writ of Error, and took these Exceptions. 1. That the Plaintif declares for a thing, the conusance whereof lyes out of the jurisdiction of the Court, for it is for wages to be paid upon the performance of a Voyage to be made in locis transmarinis. Roll chief Iustice said, this

was

was a good Exception, for they cannot enquire at Bristow whether the party hath performed his Voyage or not. The 2d. Exception was, that the Plaint if declares that the Defendant was indebted to him in such a sum of money, to render him an accompt. The Court answered, this is not good, for in such case an Action of accompt lies, and not an indebitatus assumpsit. And for these causes the Judgement was reversed, nisi; and pronounced by Jerman Justice (at the prayer of the Plaintifs Counsel) in English, being the first that was pronounced so in this Court, according to the late Act for proceedings in Law to be in English. Quod nota. Accompt. Debt.

Gowr against

Pasch. 1651. Banc. sup.

IN Arrest of Judgement upon a Verdict found for the Plaintif, in a Trover and Conversion brought by Baron and Feme, for goods of the Feme dum ipsa sola fuit. The Exception was, that it is not expressed that the goods were demanded by the Feme. Roll chief Justice said, the Demand of the Feme is good to found the Action, and it was then also said, that a Trover and Conversion lies for goods found and converted, although they come afterwards to the hands of the party that lost them. The Rule was judicium, nisi. Arrest of Judgement in a Trover and Conversion; Demand. Trover.

Pasch. 1651. Banc. sup.

MEmorandum, The first rule of this Court made in English was between White and Reblewhite. Pasch. 1651.

Pease against Shrimpton.

Pasc. 1651. Banc. sup.

Hill. 24 Car. rot. 191.

THe Court was informed by Councel that the Habeas Corpus and Bail-piece were lost, and therefore it was prayed that there might be a new Habeas Corpus, and that the old Bail put in may be allowed by the rule of Court. Roll chief Justice answered, make a new Habeas Corpus, and a new Bail-piece; but first let Tutt the Attorney that was Clark of the Bails attend here to be examined whether the Habeas Corpus & Bail-piece be lost as is suggested. Habeas Corpus. Bail.

Ritch against Sanders.

Pasch. 1651. Banc. sup.

Hill. 1649. rot. 758.

RItch brought an Action of Trespass against Sanders for taking away his Corn set forth for tithes; upon issue joyned a special Verdict was found, whereupon the case fell out to be upon the construction of the words of a will, which were these, I give all my free lands wheresoever Special verdict in Trespass for tithes upon the words of a Will.

to my Brother John Sanders and his heirs, upon condition that he suffer my wife to enjoy all my Freelands in Holford for life, the Testator having only a portion of tithes of inheritance in Holford, and no lands. The question here was, whether this portion of tithes shall be accompted free lands within the intent of the will, and so the wife be to have them during her life. Twisden held, the tithes were not devised by the will to the Feme; for if I devise my fee-simple lands to John a Stile and his heirs, tithes do not pass by this devise, for tithes are a collateral thing arising out of land, and not part of the land it self. 42 Ed. 3. f. 13. 10 Iac. Moyle and Ewers case, 31 Eliz. Perkins and Hyndes case. In the will here they pass not, for there are no words in the will to devise them, nor can the words be so expounded, and here are other lands devised to satisfie the words of the will. A term for years hath more relation to land than tithes; and a term could not have passed by the words of the will. Next, the second Clause doth not pass the tithes, for there is no such thing as is expressed in it; but if it should pass to the wife by implication, yet it cannot pass to John Sanders the Brother; for there are neither expresse words nor any implication to devise this portion of tithes to him, but the contrary rather is to be collected from the Will. Wadham Windham on the other side answered, that the Testator calls the tithes in Holford his free lands. It is true generally, that by the devise of lands tithes do not pass, but in a will by the intent of the Devisor they may pass, and the word land includes all real things in common intention and legal construction, as Lutrels Case is, 1 Mar. Bro. Tit. Elegit. An Elegit may be of a rent, and tithes have a nearer relation to land than rent have. 2dly. Here is an apparent intention to devise the tithes; for he explains his meaning in his second clause of the Will, that he intends tithes by the word lands, 44 Eliz. Com. Banc. Gery against Gery, the question there was, what passed by the word rents, whether lands passed. The words were, as to all my lands in Dale I devise my rents, &c. and here the matter comes in by a Proviso, which enlarges the matter, Trin. 3 Iac. Fitz-Williams case; One devised all his goods, Jewels, and Plate, excepting his lease in C There it was adjudged that all his other Leases passed. 4 Ed. 3. Br. grants 51. Another circumstance in the Will enforceth this construction, viz. the word wheresoever, which word expresseth the intent of the Devisor to be so, otherwise that word will be idle, and to no purpose. Hob. rep. Stukely and Butlers case: It may also appear out of the body of the Will: for it appears thereby that his Daughter was provided for in his will by his personal estate, and that the intention was to dispose of his lands to the Heir, and his Copphold lands which he had in Holford were surrendred at the time of the making of the Will, and so the devise cannot refer to them; and besides this is called free lands, which distinguisheth them from Copphold lands, and so he prayed judgement for the Plaintif. Roll chief Justice, There is a Condition annexed to the Devise, that his wife shall enjoy this land, though the words in the Will are not very proper to express it; but we must consider them as used in a Will, and not in a conveyance. Nicholas Justice said, the Devisor himself calls them free-holds, and this distinguisheth them from Copphold lands. Adjourned till Saturday following to be argued again.

Condition.

Dowse

Dowſe againſt Maſters.

Paſc. 1651. Banc. ſup.

DOwſe brought an Action of Debt upon an Indebitatus Aſſumpſit againſt Maſters for five pound, in which the Defendant pleaded that he did deliver bills to the Plaintif to the value of 6 l. in which the Plaintif was indebted to him, which bills the Plaintif did accept in full ſatisfaction; the Plaintif replyed proteſtando that he was not indebted to the Defendant, that he did not receive bills to the value of 6 l. in ſatisfaction: Upon this a Demurrer was joyned. Roll chief Iuſtice ſaid, the Plea of the Defendant is ill, for he doth not ſay that he delivered the Bills in full ſatisfaction, but that the Plaintif received them in full ſatisfaction, which is not good, for the Plaintifs receiving of the Bills muſt be as they were delivered, and not other ways, and that is not expreſſed: Therefore let the Plaintif take his judgement, niſi, &c.

Demurrer to a plea in Debt upon Indebitatus aſſumpſit.

Plea.

Roſs againſt Lawrence.

Paſch. 1651. Banc. ſup.

ROſs brought an Action of the Caſe againſt Lawrence for ſpeaking theſe Welch words of him, viz. Dedingues Will Roſs in mudon, which are in Engliſh, William Roſs hath forſworn himſelf, upon Iſſue joyned, and a verdict for the Plaintif, the Defendant moved in Arreſt of Judgement that the words are not actionable, as they are rendred in Engliſh, and ſo the Action lies not. Roll chief Iuſtice, If the words ſound in Welch that the Plaintif was perjured, yet if the Plaintif do Engliſh them in Engliſh, which doth not amount to perjury, it is ill, and an action will not lie for them, Therefore let judgement be ſtayed.

Arreſt of Iudgement in an Action upon the caſe for Welch words Engliſhed.

Caſe.

Peck againſt Ingram.

Paſch. 1651. Banc. ſup.

PEck brought an Action upon the Caſe upon an Aſſumpſit, and declares, that the Defendant, in conſideration that ſhe the Plaintif would leave her Fathers houſe, and come to the Houſe of the Defendant in ſuch a place, did aſſume and promiſe unto her that he would marry her, and that thereupon ſhe did leave her Fathers Houſe, and did come to the Defendants Houſe, et obtulit ſe in maritagium conjungi, and becauſe he had not performed his promiſe Actio accrevit: Upon iſſue joyned, and a verdict found for the Plaintif, the Defendant moved in Arreſt of Judgement, and took Exceptions, that the Plaintif did not ſhew in her Declaration when ſhe left her Fathers Houſe, and came to the Defendants houſe, nor that ſhe gave him any notice thereof. Wild moved for judgement, notwithſtanding the Exception; for, he ſaid, though it be not expreſly ſaid that ſhe gave the Defendant notice when ſhe came to his Houſe, yet it is ſaid, quod obtulit ſe in maritagium conjungi, which implies the Defendant had notice; and beſides here is no need of notice; for the Aſſumpſit is, that if ſhe will come to the Defendants houſe he will marry her, and it is not ſaid that when ſhe comes he will marry her, ſo that he is bound by his promiſe to take notice of

Arreſt of Iudgement in an action upon the caſe upon an Aſſumpſit.

of her coming. Roll chief Iustice answered, if all the Declaration be considered together, here is a good consideration expressed; for this is not like to the case of tender of money. And the words obtulit se in maritagium conjungi shall be intended to the Defendant himself, and then he must needs have notice of her coming thither. Dyes of Counsel with the Defendant took this Exception, that the Plaintif in setting forth her offer of mariage doth not say tunc et ibidem, for there is neither place nor time set forth. Roll chief Iustice answered, it is after a Verdict, and you move this Exception too late, and you have now lost the advantage of taking it. If there be a sufficient notice, it is well; if not, it is not good; for there ought to be a notice, for she may come to his house in private, so that he cannot take notice of her coming thither. The question only is this, whether notice be sufficiently and necessarily imployed in the words obtulit se in maritagium conjungi. Curia advisare vult. Postea.

Consideration.

Advantage.

Notice.

King against Weeden.

Pasch. 1651. Banc. sup.

Arrest of Iudgement in an Action upon the Case.

IN Arrest of Judgement upon a Verdict found for the Plaintif in an Action upon the Case upon an Assumpsit brought by an Administrator, 2 Exceptions were taken, 1. That the Plaintif did not shew his Letters of Administration, and 2ly. That there is no good consideration set forth to ground the Assumpsit upon: for it is that the Defendant did promise, that if the Plaintif would forbear to take his course for the monies, he would pay them, which words are uncertain, and he should have said his course in Law, and not generally his course. Roll chief Iustice to the 1 answered, It is not necessary here to shew the Letters of Administration, for they are but inducements to the Action, and not the ground of it; And for the second exception the consideration is certainly enough set forth, although the Latine be not very proper. Therefore let the Plaintif have his judgement, nisi, &c.

Consideration.

Sawyer against Russel.

Pasc. 1651. Banc. sup.

Arrest of Iudgement in an Act on upon the Case.

SAwyer brought an Action upon the case against Russel, for taking away certain Cattel, and obtained a Verdict against the Defendant; The Defendant moved in Arrest of Judgement, and took exception to the Plaintifs Declaration for the incertainty thereof. The Plaintif declared of a Trover and Conversion, de ducentis Averiis, viz. bobus, juvencis, Anglice Steers, Iuvencis, Anglice Runts, & Iuvencis, Anglice Heifers, which is uncertain, and so judgement cannot be given, for it is uncertain for what number of each of the Steers, Runts, and Heifers judgement should be given. Roll chief Iustice enclined that it is certain enough, and that the number may be averred, and the Cattel are all of one kind; yet, The Court would advise, afterward it was ruled, Iudicium, nisi.

Averment.

Shedlock

Shedleck and La. Pere.

Paſc. 1651. Banc. ſup.

Hill. 1650. rot. 211.

IN a Writ of Error brought to reverſe a Judgement given in an inferior Court, The Error aſsigned was, that the Judgement is quod recuperare debeat, whereas it ought to be recuperare debet. Roll chief Iuſtice anſwered, That if it be ſo, there is no Judgement given, and ſo no Writ of Error lies, therefore let the writ be abated. For the Writ of Error ſuppoſeth a Judgement, for the words of it are ſi judicium redditum ſit, and in 3. Iacobi in the Exchequer Chamber the very caſe was adjudged ſo.

Error to reverſe a judgment in an inferior Court. Iudgement. Error. Abatement.

Collins againſt Sillye.

Paſc. 1651 Banc. ſup.

Hill. 1650. rot. 302.

THe Caſe was this, Leſſee for years by indenture covenants with the Leſſor, that he will not aſsign over the land let, nor any part thereof, without the conſent of the Leſſor. The Leſſor during the term enters into part of the land let, the Leſſee aſsigns over the remainder of his term in the reſt of the land, without the conſent of the Leſſor, and the Leſſor thereupon brings an Action of Covenant againſt the Leſſee; the queſtion was whether it did lye in regard that the Leſſor had entred into part of the land. Roll chief Iuſtice held that the Covenant was collateral, and therefore it is broken by the aſsignment, notwithſtanding the Leſſors entry into part of the land. And the rule was judicium niſi.

Demurrer upon an entry upon Leſſee for years. Covenant.

Cuſtodes againſt Monger.

Paſc. 1651.

MOnger was endicted for forgeing a preſentment to a Jury in a Court held before Commiſsioners of ſewers, againſt Monger for caſting of 10 loads of ſoil into the Thames. Exceptions were taken that it doth not appear by the endictment, by what authority the Court was held, where the preſentment was found. 2ly. It is not averred that the preſentment did preſent the caſting in the ſoil to be any annoyance. 3ly. There doth not appear to be any proceſs in the caſe againſt the party upon the preſentment. To the firſt it was anſwered by councell on the other ſide, that it is not neceſſary to ſhew by what authority the Court was held, for their Authority is by Act of Parliament, and it is a publique Act to be taken notice of. Roll chief Iuſtice anſwered, That it is a private Act made for the City of London, and concerned the Lord Maior, though part of it be publique, for part of an Act may be publique, and another part of it private, and of that part which is private we are not bound to take notice, & it was here ſaid that in criminal cauſes, Errors in proceedings are not helped by a verdict. Roll chief Iuſt. took an exception that the endictment was only contra pacem publ.

Exceptions to the ſetting forth of a preſentment. Statute. Notice. Verdict. Indictment.

whereas at that time when it was preferred, it ought to have been contra pacem nuper domini Regis & contra pacem publicam nunc. Adjourned.

23 Car. in the Kings Bench.

Pasc. 1650. rot. 414.

Cremer { } Plaintiff
Burnet { } Avowant } in a Replevin.

Whether a copyhold estate be extinct by the Kings leasing it for life.

THe Plaintiff complains for the taking of his Cattell, to wit a Horse, Colt, and three Mares, the 13 of Iauuary, 21 Car. at Chingford in the County of Essex in a close there called Pipers down.

THe Defendant avows the taking of the Cattel in loco quo, &c. as Bailiff unto Thomas Boothbye, as damage feasant in the Close aforesaid, being the soil and the freehold of the said Thomas Boothby.

Vpon the pleading, the case appeared to be as followeth.

KIng Henry the 8. being seised in Fée in the right of his Crown in the maner of Chingford Comitis in the County of Essex, of which manour a certain tenement called Lormiers alias Heriots with the appurtenances, whereof the said Close called Pipers Down was parcell, which tenement and Close were parcell of the said manour, and was then, and had been time out of mind demised, and demiseable in Fee by Copy of Court roll, of the said manour, did build a new messuage upon the said Tenement, and did afterwards by his Letters patents, under the great seal grant the office of Keeper, and keeping of the said messuage, to Iohn Gate, for term of his life, with all the Lands, Tenements, &c. thereto belonging or adjacent, and did also by the same Letters patents give and grant unto the said Iohn Gate amongst other things, the Lands belonging to the said new built messuage, whereof the said Close called Pipers down was part, for Term of his life, for the exercising of the said office, with an averment in the plea, that before that time there was no such office of the keeping of the said house, and that the King did not know, nor was at the time of the grant enformed, that the said Tenement and Lands whereof the said Close was parcell were Copyhold of the said manour. After the grant made to Iohn Gate, as aforesaid, H. the 8. dyed seised of the said manour, & of the reversion of the said Messuage and Close after the death of Iohn Gate, and thereby Ed. the 6. became seised of them in like manner, and from Ed. the 6. they came to Quéen Mary. Then Iohn Gate dyes, and after his death, Quéen Mary enters upon the said manour and Messuage whereof the said Close was a parcell, and afterwards by her Letters Patents under her broad Seal, doth grant the Manour and Messuage and Premises unto Susan Tong, and her heirs for ever. From Susan Tong by mean conveyance, the said Manour Messuage and Premises, came to Humphry White and his heirs, and afterwards Humphrey White being seized thereof in Fée, did by his indenture of lease demise the said Manour Messuage and Premises to Leigh for 60. years, to begin from Mich. before the making of the indenture, afterward Humphrey White grants away the reversion of the said Manour Messuage & Premises to Sir John Branch, afterwards Sir Iohn Branch grants this reversion to Vdall, Vdall grants it to Bathurst, and Bathurst grants it to Thomas Boothby the Ancestor of Thomas Boothby, whose Bailly doth here make

make the avowry. Afterwards Robert Leigh who had the lease of the said Manour and Premises as aforesaid, for 60 years, deviseth the residue of this lease then unexpired, by his last Will and Testament unto Robert Leigh his Son, and dyes, Robert Lee the son being possessed of the residue, or remainder of this Term for 60. years, by virtue of the said Will did at his court, held for the said Manour of Chingford, grant the said Messuage with the appurtenances, and Lands thereunto belonging, whereof the said Close was parcell, unto Edmund Lee his brother, to hold of the same Manour in Fee, at the will of the Lord by Copy of Court Roll of that Manour, Edmund Lee was thereupon admitted accordingly. Afterwards the said lease for 60. years made by Humphrey White unto Robert Leigh, the Father, expires: Afterwards Thomas Boothby, who had the reversion of the said Manour and Premises as abovesaid, entred as in his reversion upon the said Manour and Premises, and dyed seised thereof, leaving issue Thomas Boothby his Son, Thomas Boothby the Son enters into the said Manour and Premises, and claims the said Messuage with the apurtenances with the lands thereunto belonging, whereof the Close called Pipers down was parcell, (and was granted by Robert Leigh unto Edmund Leigh by Copy of Court Roll as aforesaid,) as parcell of the demaines of the said Manour of Chingford, and doth deny it to be Copyhold, and to the intent to try the title thereof, did by the Avowant his Bailiff distrein the Cattel in the said Close, as damage feasant in his soil and Freehold.

This Case was argued first by Arthur Harris of Lincolnes Inn, who argued for the Plaintiff, viz. he that brought the replevin, and in his argument, he made the generall question in the Case to be whether the close called Pipers Down in which the distress was taken, were at the time of the distress taken demiseable by Copy of Court Roll, or whether the Custom was not destroyed, and he held it was demiseable, and that the custom was not destroyed, and hereupon he made four questions. 1. Whether the grant of the new house to Sr. John Gate per nomen officii of keeper thereof were a good grant. 2ly. Whether the King not being enformed at the time of the grant, that the house was Copyhold tenure, he was not deceived in his grant. 3ly. Whether by this grant the Custom was not destroyed. 4ly. Whether the Kings Patentee hath not the same privilege to grant this house, &c. again by Copy of Court Roll after the death of Sr. John Gate, And as to the 1. of these 4. questions, he cited 8 E. 4. by Chock, and 21 E. 4. 79. and Mich. 5 Car. Banc. Reg. Monsons case, and Pasc. 14 Car. Banc. Reg. Messand and Butterfields Case, and 5 E. 4. f. 8. and Dyer 269. Savages Case. To the 2d. question he held, that the King was not here enformed of his right, and consequently he was deceived, and therefore ought not to be prejudiced by his grant, which he should be if he had not liberty to demise this house again by Copy of Court Roll, after the death of Sr. John Gate, and he said that there are two rights in the King, 1. At the Common Law, and 2ly. a customary right, and of this Customary right, or his jus concedendi he was not enformed, and he cited these books, 3 H. 7. 10. rep. 49. 8 H. 6. 25 Br. Ayd 45 4. H. 6. 1. 2 R. 3. Hunsons Case, and he said that the book of 5 H. 7. f. 1. which is objected is not to purpose, for the protestation is not well taken, 19 H. 6. a protestation is to supply a matter, which is not so here. 41 E. 3. Fitzh. protest. 9. 22 H. 6. 27. Br. protestation 6. Plowd. Coment. Gresbrooks and Foxes Case, and 20 Eliz. Burrell and Holcrofts Case. 2ly. The King is not enformed here in his grant in matter in Law, as he ought to be, and therefore his grant shall not turn to his prejudice, 1 rep. 52. 18 H. 8. Lovels Case, Pasc. 2 Eliz. Sr. Thomas Mores Case, 1. rep. 63. 16. Jac. Needlers case; and whereas it is said that the words ex certa scientia in the patent do declare that the King was enformed, I answer, that those words do intend no more

but that the King was enformed of matters of fact, and not of matters in Law, and the Kings grant shall only be taken secundum intentionem; and whereas it may be objected that by the granting of the Estate for life unto Sr. John Gate, the custom is destroyed, I answer, that this being in the Case of the King, it is an extraordinary Case, and not to be measured by ordinary rules of Law. And 2ly. Antient grants are to be construed as the Law was at that time when they were made, 9. rep. 27. 6. rep. 48. 1 H. 7. 23. 14 E. 3. Fitzh. Scire facias 23. and the King is not bound by a general custom as Common persons are, 35 H. 6. 29. by Prisot, 22 Ed. 3. The King shall not pay a heriot upon the purchase of heritable Lands, and we shall find that many maximes of Law upon serious scanning of them, are not so certain to be relyed on, as they are commonly held to be, 5. rep. Knights Case, Pasc. 3 Eliz. B. R. Conisby and Risby, Dyer 10 Eliz. and the patentee of the King shall have the same privilege, that the King should have had if he had not granted the Letters patents, 27 Eliz. Stubs and Rigfords case. At another day Arthur Harris spake again to the point, that the King had no legall intent to destroy the Copyhold Estate by his patent, and therefore it should not be destroyed, and cited Grotius de jure belli et pacis, 343. and that no such intent can appear in the words of the patent, and cited 7. rep. Inglefields Case, and 17 E. 3. f. 19. and Cooks Institutes 373. and 1. rep. 46. and Plow. 333. and as to the last point he argued, that the Patentee of the King, shall be in the same condition, as to the reviving of the Copyhold Estate, as the King should have been if he had not made the grant, because that the King hath the Fee, and he may grant it as he pleaseth, Dyer 16 Eliz. 337. 1. rep. 31. 10 Eliz. Dyer 266. 24 Ed. 3. Fitz. Tit. guard 27. and no prority can be pleaded against the King, nor against his Patentee, Hill. 30 Eliz. Stubs and Rightwayes Case, an Action of Accompt against Executors doth lye only for the King. It is true that prerogatives inseparable, and annexed to the person of the King, cannot be granted away by the King, but prerogatives separable may be granted away 12 H. 4. Fitzh. guard 81. The Grantee of the Grantee of the King shall have the prerogative of the King, by reason of the thing granted by the King, Brook prærog. 17. 21 H. 7. 2. Br. entre congeable 40. The King may distrein for a rent seck; but not his Grantee, because it is a prerogative executory, and not executed, for in such case it is otherwayes; and as to the objection to the cause of the demurrer set forth, that the Concessit is not answered, because it only sayes mentionat. esse concessum, I hold it well enough; but if it should not be, yet it is helped, for both partyes do agree in the setting forth of the Letters Patents, 34 Eliz. B. R. in Hart and Smiths case, and the grant is confessed in our rejoynder, and though the demurrer should not be good, yet the Avowant cannot have Judgement, for he hath not entitled himself to the Action as appears by his grant, for his grant is void, and cannot take effect, rep. 46. 8. rep. 201. 39 Eliz. in the Chequer Chamber. Where 2. Manours are granted by the name of one of them, the grant is not good. And in our case Thomas Boothby had nothing in the land at the time of making of the deed of Covenant to stand seised to uses as it appears by the Avowants own pleading, and the postea cannot help it, Dyer 111. Clarks Case, Hill. 15 Iac. entred Trin. 15 Iac. rot. 29. Desmons case, 20 H. 6 15. Hales on the other side argued for the Avowant, and prayes a return of the Cattel distrained; first, he put the Case at large. And he said that the Plaintiff hath not well set forth the Kings grant in his bar, and so it is all one, as if he had not set it forth at all, Plowd. 563. and he hath disputed that which we have not alleged, and the sur rejoynder is but argumentative, and not positive, and nothing appears to the Court, and he hath quite mistaken his course and way. But admitting the case, and the points to

be

be as they are made, viz. 1. Whether the new Office be well granted, because the word Conſtituimus is omitted. 2. Whether the grant for life be good. 3. Whether the grant of the Copphold for life be a ſuſpenſion of the Copphold eſtate, or an extinguiſhment of it, which is the great queſtion in the Caſe.

For the 1 point I hold that here is a good grant of this new Office, and that the word Conſtituimus is not neceſſary, becauſe that there are ſpecial fees alſo newly granted. 2ly. This is not an Office in groſs, conſiſting and reſting upon it ſelf; but it is a relative Office or an imployment incident to the intereſt of the houſe granted, and therefore the word Conſtituimus is not here neceſſary, Dyer 200. 3ly. If it be not a formal Office, yet here is a good grant of an employment, to which a recompence may be adnex; although an Aſsize cannot be brought for it. 3 Aſſ. Trin. 6 Iac. Abercromies Caſe: And here the proteſtation that the King was not informed that this was Copphold land is unneceſſarily alleged, and therefore it is not of neceſsity it ſhould be anſwered; and if it be not well ſet forth it is not material. For the 2 queſtion whether the King was deceived in his grant, he ſaid that the King needed not to take notice of any former eſtates, and that the Statute expreſſeth, that it is not neceſſary to recite them, 24 H. 8. 21. To the 3 point & the chief queſtion, whether the Copphold eſtate be ſuſpended or extinguiſhed, he held it was extinguiſhed, and cited Knights caſe. & Alton woods caſe, and ſaid, that the rules of the Civil Law ought not to be applyed to the Common Law, nor to be cited to perplex the proceedings thereof, and were this in the caſe of a Common perſon, without doubt the Copphold eſtate would be deſtroyed, 20 Eliz. by Popham and Fenn, and the King here hath the Fee-ſimple, and there is no difference between the caſe of the King, and of a Common perſon in this regard; a thing which will not paſs by the King without notice, will not paſs with notice, and here is no prejudice to the King in not taking notice whether by the Patent the Cuſtom to grant Copphold eſtates be deſtroyed or not; and here is a neceſſary conſequence in Law, that the cuſtom is deſtroyed, becauſe the King that had the fee in the Mano hath ſuſpended the Copphold by his grant. All the Arguments uſed on the other ſide are to deſtroy the Kings grant, and the caſes put do all differ from our caſe, and do ſtand upon their own bottoms: For ſhall the King be intended to be miſconuſant of his particular grant, ſuch as this is, although he may be in a general grant, lib. Aſſ. 21. pl. 19. Paſch. 12 Car. C. B. Glover and Edgars caſe, and it would be a great miſchief if the Copphold eſtate ſhould be revived. As to the laſt point, whether the Patentee ſhall be in the ſame condition as the King was, he ſaid that it is not material whether he be or no, as to the Caſe in queſtion, and reſted upon the 3 queſtion. If the King hath free-warren in land, and grants the land, and mentions not the warren, yet the warren paſſeth by the grant: And here our Avowry ſtands pro confeſſo, becauſe the Plaintiff hath made no title. A grant of a Mano per nomen maneriorum is a good grant of the Mano, and here is a good grant, and if not, yet it is helped by the Statute of 3 & 4 Phil. & Mar. C. 1. 1 H. 7. f. 28. and the Poſtea here refers not to the grant of the Copy, and here is no ouſter alleged, and if there be, there is no diſſeiſin, but it paſſeth an eſtate for will between the parties. Roll chief Juſtice, It would be dangerous to make the Patent void, becauſe the King took no notice of the Copphold eſtate, and this point is not fit to be argued: A thing not materially alleged in pleading is not neceſſarily to be anſwered, and it is not neceſſary to create ſuch an Office as this is, for it is but an employment. The great queſtion is, whether after the death of Sr. John Gate, the Copphold eſtate can be revived or not in the caſe of the King. It may be dangerous whether it be one way, or the other. As to the pleading we will not make it ill, if it may be

good. Argue the great point again, for it is a difficult point, and of great conſequence. Ierman Iuſtice to the ſame effect, and enclined, that the King had no intent to deſtroy the Copphold, and he held that the Office was well granted, becauſe it was but an imployment. Nicholas Iuſtice inclined, that the Copphold was deſtroyed. At another day Wadham Windham argued for the Plaintif; and firſt he put the caſe at large, and then ſaid, that 1. It appears by the replication that the Avowant hath no title. 2. He confeſſeth that the Plaintif hath a Title. Queen Mary ſeiſed of the Manor of Chingford Comitis, whereof Pipers Down is parcel, grants it per nomen duorum illorum maneriorum, and it is not averred that ſhe had two Manors. Firſt, it is conſiderable, whether the Patent be good by the Common Law, 2ly. Whether, if not, yet it be made good by the Statute of H. 8. and he held, 1. That it is not good at the Common Law, becauſe it is incertain, and wants ſufficient words, and here is an apparent falſity, for he hath two Manors, and he grants but one; and if the King have two Manors, and grant them per nomen Manerii, this is not a good grant; As tithes belonging to a Rectory cannot paſs by the name of a portion of tithes, neither do all the Statutes of Confirmation of Patents, confirm leſs or greater values granted, than are compriſed in the Letters Patents, 41 Eliz. Paſons caſe in the Exchequer. A preſentation to a Rectory where it ought to be ad Medietatem Rectoriæ is not a good preſentation, 3 rep. Dodingtons Caſe, Dyer 331. An ill grant is not helped by the Statute, becauſe it is not named. 2ly. A falſe ſuggeſtion is not helped by the Statute of 34 H. 8. 3 Car. Sir Hatton Farmers caſe, and in our caſe here is a miſtake of a thing, and not of the name, for it is a Manor for Manors, and ſo there is no true meaning, and therefore it cannot be helped by the Statute, Paſch. 1 Iac. rot. 216. C. B. Dawſon againſt Pickering. The Queen was ſeiſed of two Manors, viz. of Ruſhworth, and of Dale, and granted the Manor of Ruſhworth, habendum the Manor of Ruſhworth, with the Manor of Dale, and it was held an ill grant at the Common Law, and not helped by the Statute. But it is objected that this Manor may be known by the name of two Manors, and ſo in our caſe, although the King was ſeiſed of one Manor, and granted this Manor habendum per nomen duorum Maneriorum, this is good, Mich. 22 H. 6. pl. 16. f. 13. To this the anſwer is, that it cannot be pleaded per nomen without an averment that there are two Manors, 2 Ed. 4. f 28. the laſt caſe: There is a difference between a feofment and a releaſe, a feofment may be pleaded per nomen without an averment; but a releaſe cannot be ſo pleaded, for in a feofment the livery operates to paſs the land, 22 H. 6. Hill. f. 39. pl. 9. 13. and Dyer, the Serjeants Caſe; where there is certainty there needs no averment; but it is not ſo in our Caſe 1 H. 7. f. 28. and it is a forein intendment to ſuppoſe that one Manor of Chingford Comitis ſhall be known by the name of the two Manors of Chingford Comitis, and we need not plead by a non conceſſit, becauſe the Avowant hath made no title, and ſo he can have no return, 1 H. 7. f. 28. 6 H 7. f. 6. and here is no certainty added to make it certain by the words illorum quod nuper perquiſivimus de, &c. To the ſecond point, The Avowant hath confeſſed the Plaintifs title, for he hath confeſſed, that K. H. the 8th. hath made it a Copphold, and if the Copy be good, our title is good. As to the queſtion, whether when a Copphold comes to the King, and he leaſeth it, this doth not ſo deſtroy the Copphold, that when the leaſe is out it may not be Copphold again. I hold, that if a Common perſon leaſe a Copphold, the Copphold is deſtroyed; but it is not ſo where the King leaſeth it, as it is in our caſe, which ought not to be meaſured by the Common rule of Law, for the Law of the Crown over-rules the Common Law, and the Law of Cuſtom, 22 E. 3. The King is not bound by Cuſtom

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as a common person is, 35 H. 6. The King having Gavelkind lands may destroy the Custom which runs with such lands pro tempore only, and the Kings grant shall not enure to a secondary operation, as Knights case is; and here is no prejudice to any person that the Copyhold estate should be revived, here the consequence may be severed, and it is not necessary; and therefore the lease of the Copyhold, not naming it Copyhold, is good. As to the Objection made, that it is no benefit to the King to make it Copyhold again; the answer is, That it is a prejudice to take away a mans privilege and liberty, if there were no other inconvenience; but here is more, for there may be prejudice by losing the Common, &c. And the rule, that a Custom is an entire thing and cannot be apportioned, shall not bind the King, although it do bind common persons, and the Statute makes not the grant good as to the reversion. The Copyhold is demised, and yet shall be demisable hereafter, and so it may be pleaded, for pleading follows the Law: A Custom interrupted in the right is gone for ever; but if it be interrupted but in part, it is not so, as it is in the case cited, where the King hath Gavelkind lands, Com. Plowd. 114. and so prays judgement for the Plaintif. Adjourned. Latch at another day argued for the Avowant, and said, that the Plaintif in his rejoynder hath made no title unto Susan Tong, from whom he claims. It is objected, that by the grant of the Manor of Chingford Comitis per nomen duorum illorum maneriorum, &c. that Tong cannot be intituled. It is answered that the other side hath confessed, that Tong hath a title, for they derive from her also, and the contrary doth not appear to the Court, and it being agreed, the Court will not make a doubt of it. He made 3 Questions, 1. Whether the Manor of Chingford Comitis passeth per nomen duorum illorum maneriorum de, &c. 2ly. Whether if the grant be ill it be aided by Statute. 3ly. Whether it be helped by the Averment. For the 1. he held, that here is a good grant, without any averment or aid of the Statute; for if the King grants two Manors one shall pass, and e converso, it shall not be so in the Case of the King, but it is good in the case of a Common person with an Averment. The grant of the Manor of Saperton cum Rippen is an ill grant for the incertainty of it; but here is no such incertainty, here is no non nomer of the thing, for the word nomina requires not a proper name; but it is all one, as if it had been expressed by words comprehending it, and the word Manors doth comprehend it. If the King grant his two Acres of Land lying in a Common field, although but one Acre is to be found, yet the grant is good, and it is not like to the grant of a Manor with the Advowson, where the King hath but a moyety of the Advowson, or a moyety of the Manor, for the Moyety is not actual in the whole, but one is actually in two, and so it is well named here. 2ly. Whether it be good, without an averment that the land was in the Lord Darcy, and he held it was. If the words were general in the grant, all of them ought to be true, otherwise nothing will passe by the grant, as Dedingtons case is; but here is a proper name to express it, and therefore the grant is not destroyed, although the latter description do not agree to it, 10. Rep. Harpers Case. 2 H. 4. f. 2. If the King grant all the lands in the Patent annexed, bearing date 10 of June, though the Patent bear date the 10 of July, yet is the grant good; for veritas nominis tollit errorem demonstrationis; and if the grant should not be good at the Common Law, yet it is ayded by the Statute of 3 & 4 Phil. & Mar. and here is a full and a strong averment in the pleading, for it is Manerium prædictum, and not Manerium generally, and here is not only a possibility, but also a facility for it to pass, and it may be called Manor, or Manors: and in a feofment a thing may pass per nomen, because that the livery passeth it, where one pleads per nomen he is to make the Plea agree with the Record or speciality, otherwise per nomen

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men ſhall not be pleaded, and Newtons opinion againſt this is but a ſingle opinion, 33 H. 8. Br. Averment 42. The word prædict. makes an averment in the name of the Feoffor, 24 H. 4. 30. 22. H. 6. 40. Barton and Eſcott, & here is alſo a full averment of the thing granted, & this is in grants, 7 E. 4. 24. 33 H. 6. f. 22, 26 Aſſ. 2. 24 Aſſ. 6. ſo in Letters Patents, Dyer 86. the Serjeants caſe, and if this be authority it is in the very point, Dyer 207. prædict. per nomina is a good averment, Paſch. 7. Iac. Rot. 430. B. reg. Stonehouſe and Reeds caſe, where there was not ſo much as a per nomina, but only decimas prædict. and yet adjudged to be a good intitling, by the word prædict. becauſe it was held a good averment, although it was not led on by a per nomina, and there admitted to be clear if it had been with a per nomina, as the Caſe here is, ſo Tong is well intitled. 2ly. The Plaintifs title is well avoided, and we have well deſtroyed his Copy; without doubt if a Common perſon had granted the Copyhold for life, the Copyhold had been thereby extinguiſhed, and our caſe is not a prerogative caſe, for the King is bound by the Cuſtom of the Manor, and the Cuſtom is here deſtroyed, and the prerogative cannot create the Cuſtom anew, and it is againſt the Kings Prerogative to have things drawn out of the King, without matter of Record; and it is prejudice to the King to have the Cuſtom revived, for the lands are now made free, and ſhall never return again to the Vaſſalage. The Kings Prerogative exalts him above a Common perſon, but this cuſtom makes him equal to a common perſon. 2ly. The Cuſtom here cannot be ſupported; but here is an abſolute extinguiſhment of the Copyhold, ſo that it cannot be regranted. The law will confirm things neceſſary to the grant of the King in ſome caſes where it is prejudicial to the King, 16 H. 7. f. 8. Nicholas caſe Plowd. 489. The king ſeiſed of a donative makes it preſentative, if he do but once preſent unto it, ſo if he turn an Annuity into a rent charge by taking a diſtreſs: And the nature of this Cuſtom here ought not to be examined with other Cuſtoms, for it is more ſtrict than in other caſes, for if it be once deſtroyed, it is always deſtroyed, and cannot be ſuſpended, and it is not for the Kings diſadvantage to have the Copyhold deſtroyed; but it is for his advantage and convenience, and ſo he prays judgement for the Avowant. Roll chief Iuſtice, All will come and reſt upon the laſt point, for all the other things are admitted: The grant is good by the per nomen, and it is only nominal, and doth not imply that there are two Manors, and it may ſtand well enough with reaſon that it may be known per nomen: But the laſt point is conſiderable; he enclined to Latch. Nicholas Iuſtice to the ſame effect, and that the prædict is a good averment. The laſt point is conſiderable, but prima facie, here the cuſtom is not deſtroyed. Ask Iuſtice to the ſame effect, and that it appears that the King intended to grant but one Manor. Roll, We will take time till the next term to ſpeak to the laſt point, which is only doubtfull, and to deliver our opinions. Ierman Iuſtice, the pleading of the party per nomen helps not the Patent, if it be not good in it ſelf. The next Term Roll chief Iuſtice for himſelf and the reſt of the Judges, who he ſaid concurr'd in opinion with him, delivered the opinion of the Court to this effect. 1. That they were agreed that the grant of the Office of the Cuſtody of the houſe is a good leaſe for life, notwithſtanding it was Copyhold, and it is not neceſſary to recite in the grant that it is Copyhold. 2. That after the eſtate for life is determined, the King may grant the houſe and land again by Copy of Court Roll, becauſe the Kings grants ſhall be taken favourably, and not extended to two intents, where there is no neceſſity for it, as there is not here, and we are not here to intend a collateral intent, and ſo the Copyhold is not deſtroyed; for the Law takes care to preſerve the inheritance of the King for his Succeſſors,

sons, and it may be a benefit to the King to have it continue Copyhold, viz. to have Common, &c. and his election is also destroyed, if he may not have it Copyhold. So Judgement was given for the Plaintif, nisi.

Pawsey and Lowdall.

Pasc. 1651. Banc. sup.

Pasc. 1650. rot. 275.

IN this Case formerly argued, Roll chief Justice, and Nicholas and Ask Justices agreed, that the devise of the Copyhold here is a devise to the Heirs of the Father, and so a Fee-simple, and that the party comes not in as a purchaser, and for this cause the judgement was reversed, nisi. As to the other point, whether the surrender of a Copyhold by a Tenant for life be good in this case, the Court delivered no opinion; Antea. Judgement reversed upon a special Verdict touching a Devise of Copyhold lands.

Trundall and Trowell.

Pasch. 1651. Banc. sup.

Hill. 1650. rot. 670.

IN this Case it was held that Tenant in antient Demesn cannot after imparlance plead antient Demesn, for he hath made a full defence, for he says Defendit vim et injuriam quando, &c. which implyes all the rest, Mich. 22 Car. Banc. Reg. Yet it was ruled to be again spoken to. Where antient Demesne cannot be pleaded.

Peck against Ingram.

Pasch. 1651. Banc. sup.

THis Case formerly spoken in was moved again, and Latch held, that the words obtulit se in maritagium conjungi, was a good notice upon the whole matter, and therefore that the Action did well lye. Roll chief Justice answered, this is a personal thing, and ought to be offered to the party himself, otherwise it is no notice, and that doth not appear here, and if there be no notice implyed, then the Action lies not; and Holmes and Twists case is, that there ought to be notice if the thing be to be done by the party himself, otherwise if it be to be done by a stranger, so is it here; but the question only is, if notice be implyed here or not? Ierman Justice said, there is no tender of marriage if the other party be not there. The rule was for the Plaintif to take his Judgement. Whether a good notice?

Rooke against Smith.

Pasch. 1651. Banc. sup.

ROoke brought an Action upon the case against Smith for speaking these words of him, Thou art a poor fellow, and art not able to pay 2 s. in the pound, and art not able to pay thy debts. Upon an Issue joyned, and a Verdict for the Plaintif, the Defendant moved in Arrest of Judgement, that the words are not actionable; for 1. the Plaintif is not by them charged Arrest of Judgement in an Action upon the Case for words.

with the crime of being a Bankrupt, and so there is no particular losse to him. 2ly. It is not shewed that the Plaintiff got his living by buying and selling, or that he is indebted, and 11. Iac. Brook and Clarks case, was cited. Twisden on the other side answered, that the Plaintiffs credit was impaired by the words, and by his credit his livelyhood is in part maintayned. And he cited Viccary and Barns case. Adjourned to the next Term. Wild afterwards moved again for Judgement, because the words being spoken of a tradesman, he conceived them to be actionable. Maynard on the other side held them not actionable, because there is no particular damage alleged to grow to the Plaintiff by speaking of them, and because there is no crime objected against the Plaintiff; for poverty is no crime; but a man may be poor and honest at the same time, and he cited two cases to be adjudged, that a particular damage ought to be alleged. And said that these Actions are not favoured in Law, and therefore if the words be not clearly Actionable, it was not reason to make a forced construction of them to make them so. Next the Plaintiff hath not averred, that he was able to pay all his debts for all the things bought; but only of a debt contracted by the buying of the Oyl mentioned. Twisden denyed the cases put by Maynard of the particular damage, and held the words actionable. Roll chief Justice said, a man may be a Bankrupt, and yet be honest, for he may become so by accident, and not of purpose to deceive his creditors. But here is no need for the Plaintiff to shew he had a particular losse by the words, for it is enough that he is generally scandalised by them, neither is it necessary for him to averr, that he was able to pay all his debts as Maynard hath alleged, Therefore let the Plaintiff have his Judgement nisi, Antea.

Averment.

Owen against Jevon.

Trin. 1651. Banc. sup.

Pasc. 1651. rot. 211.

Arrest of judgement in Action for words.

OWen brought an Action of the case against Jevon for speaking these words of her, viz. This is the whore that my man Cowell begat a bastard on, and spent all my mony upon, and the queen hath been too long in Town to my ease; Upon an issue joyned, and a verdict for the Plaintiff, Twisden for the Defendant in arrest of Judgment urged that the words are not actionable, because there is no special losse or damage alleaged by the Plaintiff happning to her by reason of the words, & said that in one Lighfoot and Pigots case it had been ruled that an Action lies not for saying a woman had a Bastard, and he cited also Winter and Barnards case, Trin. 1650. in this Court. Upon these reasons Judgment was stayed till the other side should move.

Iay against Iay.

Trin, 1651. Banc. sup.

Trin. 1650. rot. 1350.

Argument in a special verdict touching the consideration of the words of a will.

THis case formerly put and spoken to, was again spoken unto by Latch, wherein he made this question, viz. whether the limitation to I. and his heirs were good or not? and he held it was not good; for he said that such limitation in case of a freehold is void. He confessed that in the case of Pell

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and Brown 17 Iac. rot. 44. the contrary was adjudged; but that there did appear such apparent inconvenience in it, that upon it the Court was afterwards divided, and 21 Iac. in the Serjeants case it was made a flat quære, and ever since it hath been disputable, whether a contingent devise be good or not, and in Iacob and Tellings case it is not determined; and Hanbury and Cookrells case is not adjudged; but if it be, it is on my side, and Mich. 37 & 38. C. B. rot. 1149. It was adjudged upon solemn argument at the Bar, and on the Bench, contrary to the Judgement in Pell and Browns case, if lands be devised to one and his Heirs, and if he dye without issue, that the land shall be to another, and his Heirs. this is no Estate tail; for it cannot stand with the rules of Law to devise such an Estate, for it is but a possibility, and if it should be more, it must be a Fee upon a Fee, and so a perpetuity, and it cannot be known within what bounds it shall end, either in case of years, or life, or other contingencies; and the comparison of Lamports case is not like to this case, for that was of a Term, but this is of a freehold, and a contingent devise of a freehold is not good since the Statute of 32 H. 8. and Brook tit. devise, 2 Dyer, 28 H. 8. f. 37. is not an opinion against this. And though there could be such a devise of other lands, yet Copphold lands cannot be so devised as the case is here, for there cannot be so much as a possibility of reverter, for there is no custom to warrant it, Hill. 5. Car. King and Leyden in this Court, and Dyer 364. and though there might be a reverter, yet he cannot devise it by will, and if he could, yet here the conveyance is made up by surrender, admittance, and devise, and the party is here in by the surrender, and not by the devise; and so is a Copphoulder in by Act executed, and not upon the contingency, and the will is but to direct; and though all this be otherwise, yet the Plaintiff cannot have Judgement, for it appears not that the surrender is presented at any Court at all, and here is nothing but a recitall found. Ierman Iustice said by the Common Law there ought to be a presentment at the next Court. Roll chief Iustice, and Nicholas Iustice. There is no certain time for the presentment; but it is according to the Custom of the Manor, so that it be within the life of the Tenant. Roll chief Iustice said, it is an inconvenience to devise such a contingent Estate. Nicholas doubted, for he said it would shake many wills, if it might not be, and so said Hales. The Court would advise. Hales confessed the verdict was imperfect, but prayed it might be amended; But Latch answered it is good enough for us the Defendants, for we have primer possession. The Court answered it would be good to have it amended, and not to have a venire de novo, for that will be chargeable; but if the verdict be imperfect to bring the matter in Law in a question, we can grant a new venire, although it hath been heretofore doubted. Therefore be advised, so that it may be argued. Antea. Venire.

Heal against Green.

Trin. 1651. Banc. sup.

Hill. 1649. rot. 370.

The case between Heal and Green upon a special verdict formerly argued by Latch was again spoken to, and argued by Twisden, and he held that the Feme had power by the Will to make the lease, notwithstanding that she hath but an Estate for life, and cited 11 Car. Br. Hill. rot. 810. Iob and Whites case, and 21 Iac. Danyel and Vgnel, and he said that the remainder limited to the daughter doth not hurt, for it may very well Argument upon a special verdict upon construction of words of a Will.

ſtand with the will, and the intent of the Teſtator appears upon the whole to be to give ſuch a power to his wife to make this leaſe, and cited 8 Car. Perd and Benſams caſe. And there is a clauſe in the will that ſhews that the Teſtator did intend to advance his wife by this deviſe. And the Feme ſhall be in by the power, which ſhall make the eſtate of the leaſe good, and it is not neceſſary to recite the power, as it is held in Rogers caſe. Maynard on the other ſide ſaid, he would not diſpute the power; but here is no ſuch power given to the wife as it appears by the expreſſe words of the Will, which doth only deſcribe that ſhe ſhall only make Eſtates but for her life, otherwiſe ſhe might make Eſtates in Tail, or in Fee, and if this ſhould be the laſt part of the Will, which doth limit, the remainder would be deſtroyed, and generals in a Will ſhall not revoke an expreſs deviſe; but they ought ſo to be conſtrued that all the Will may ſtand together, as Bonhams caſe is 8. rep. Roll chief Iuſtice, It is a difficult thing to ſhew the meaning of the Teſtator here, but the general muſt not deſtroy the particular deviſe to which Nicholas Iuſtice aſſented, and Roll enclyned that the Feme had power by the Will to make this Eſtate, otherwiſe the words of the Will muſt be idle, and void, and it may be the Baron intended to give his wife ſuch a power, that ſhe might deſtroy the remainders, and otherwiſe there cannot be any conſtruction made of the Will. Ask Iuſtice differed in opinion, and ſaid it was unreaſonable the remainder ſhould be deſtroyed, which is expreſly limited by the Will, and a Will doth differ from a conveyance Nicholas Iuſtice ſaid, that the words ſhall be expounded to ſhew his bounty to his wife; but not to give her power to deſtroy the remainder. Ierman Iuſtice, There are expreſſe words, for the Feme, and the daughter and the Feme hath a power; but not to deſtroy the Eſtate of the daughter. Curia adviſare vult. Antea.

Booth againſt Lambert.

Trin. 1651. Banc. ſup.

Hill. 1649. rot. 201.

Argument and judgement upon ſpecial verdict, the queſtion whether dower well aſſigned or not.

Upon a ſpeciall verdict upon theſe words, viz. I do endow you of a third part of all the lands my Coſen I. S. your husband dyed ſeiſed of. The queſtion was whether the feme were well endowed by theſe words, becauſe he doth not ſay that he endows her by metes and bounds, Chaſe held ſhe was not well endowed, and cited 8 Ed. 2. 15. and ſaid that here is incertainty which begets diſſention, which ought not to be, and the thing is not here entire; but may be devided. And this is an aſsignment of dower, which differs from a demand of dower, for a demand may be general as in the caſes of Thyn and Thyn in this Court, and of Fairefax and Fairefax, and ſo the book of 8 E. 2. entry congeable (S) 5. which ſeems to prove the contrary, that is not to our caſe, for it differs from it. Meriſield of Councell on the other ſide held the feme was well endowed, and agreed the caſes put by Chaſe. That of Common right a feme ought to be endowed by metes and bounds, yet ſometimes it is otherwiſe, as 3 Eliz. Dyer 27. a feme endowed in Common. And the feme that is to be endowed, and the party who is to aſsign the dower, may agree that the dower ſhall be aſsigned without bounding it. For conſenſus tollit errorem; But dower ad oſtium eccleſiæ muſt be more certain, Mich. 43, & 44 Eliz. Bullock and Finches caſe, Hill. 4 Iac. C. B. Roll chief Iuſtice, Of Common right a feme ought to be endowed per metas & bondas, where the Sheriff aſsigns dower, who

Dower.

who is an officer of the Law, and ought to prevent incumbrance, and disputes; But it may be assigned generally of the third part in some cases, and the partyes may agree against Common right, and here both partyes agreed to take dower in this Manor. And though here the termer for years of the land who is a third person, be prejudiced by this assignment, yet this alters not the case, because it is only an estate for years, and toucheth no freehold. Nicholas and Ask Iustices ad Roll. Iterman Iustice, If dower be of a third part, it ought to be by metes and bounds generally; but if it be of a moyety it is not so, or if the partyes consent it shall be otherwise. Roll If the Sheriff assign dower, and so it not per metas & bundas it is Error, if it might have been so assigned, and where a feme cannot be endowed per metas & bundas she may enter without assignment. Iudgement was given for the Defendant nisi, &c.

Consent.

Error.

Smith against the Earl of Dorset.

Trin. 1651. Banc. sup.

SMith moved the Court against the Earl of Dorset, for an attatchment for disturbing of him in the possession of certain Lands, contrary to the rule of this Court, for the Plaintiff to have possession. The Court answered that for only disturbing his possession, there ought not to be an attatchment granted; but if he be put out of possession, he shall have an attatchment. The Councel replyed that the partyes cattel were driven off from the land, which they conceived was an ousting of the party from his possession. To this the Court answered, that this seemed to be a putting out of possession, And therefore ordered that the Defendant should shew cause why an attatchment should not be granted.

Motion for an attatchment for disobeying a rule of Court. Attatchment.

Owen against Ievon.

Trin. 1651. Banc. sup.

Pasc. 1651. rot. 211.

THis case formerly spoken unto in arrest of Iudgement, and then stayed, was again moved, and Iudgment prayed for the Plaintiff by Serjeant Glyn, who argued that the words were actionable, because if they were true, the party of whom they are spoken is punishable by the Statute of 7 Iac. with corporal punishment and besides the words were spoken since the last Statute made against Adultery, which doth aggravate the words and make them more actionable. Iudgement was given for the Plaintiff, nisi. In this case it was said by the Court, that it was adiudged in one Thecker and Duncombes case, that a woman may have a child in 38. weeks, and that a woman by cold, or hard usage, may go with child above 40 weeks. Antea.

Iudgement prayed in an Action for words.

Nelſon againſt Tompſon.

Trin. 1651. Banc. ſup.

Trin. 24 Car. rot. 343.

Demurrer in an Act on upon the Caſe upon a promiſe.

NElſon brought an action of the Caſe againſt Tompſon, and did declare that the Defendant, in conſideration that the Plaintif would ceaſe to proſecute a ſute in Law againſt him, did aſſume and promiſe unto the Plaintif that he would pay unto him 8 l. & the charges of ſute which he had been at, & for breach of this promiſe Actio acrevit, & ſets forth his damage. To this Declaration the Defendant demurs in Law, & takes this Exception, viz. That there is no time nor place ſet forth where or when he did forbear to ſue the Defendant, as it ought to be, becauſe it is a traverſable matter. But Roll chief Juſtice anſwered, It is not neceſſary to allege a place of a negative thing to be done, viz. to ſay that he did not proſecute the ſute in ſuch a place, or at ſuch a time, for he ought to forceaſe proſecution in all places, and at all times. Therefore let judgement be ſhewn for the Plaintif except better matter be ſhewn Friday next.

Lyda'e and Lyſter.

Trin. 1651. Banc. ſup.

Mich. 1650. rot. 387.

Judgement in Debt upon a Bond reverſed.

AN Action of Debt was brought upon an Obligation made to a Biſhop and his Commiſſary for the payment of Debts and Legacies, the Action was brought by an Executor, and judgement given by Default againſt the Defendant, the Judgement was reverſed by a Writ of Error becauſe the Action was brought in the Debet and Detinet, whereas it ought to have been brought in the Detinet only, becauſe it was brought by an Executor.

Saunders againſt Ritch.

Trin. 1651 Banc. ſup.

Hill. 1649. rot. 758.

Special Verdict in Treſpaſs and Ejectment.

IN an Action of Treſpaſs and Ejectment upon a ſpecial verdict found. The Caſe fell out to be this. A man by his laſt Will and Teſtament deviſed all his Fee ſimple land whereſoever to his Brother, upon condition that he ſuffer his wife to enjoy all his free lands in Holford during her life; and the jury found that the Teſtator had only a portion of tithes in Holford: The queſtion was, whether the portion of tithes did paſs to the wife by this deviſe. Merifield held, That the Tithes paſſed not by the deviſe, becauſe the word lands cannot extend to tithes, for that would be a very forced conſtruction, and cited Trin. 17 Iac. Banc. Reg. Knight and Knights caſe, and Mich. 39 & 40 Eliz. Entred 38 Eliz. rot. 269. Yow and Hardings caſe Banc. Reg. That Houſes are not deviſable by the name of lands, and he ſaid, that the word whereſoever makes no difference, as to make the tithes paſs;

and

and though there be an implication and an intent in the Testator here to devise the tithes, yet that will not serve, because there wants words to express this intent, and though this be in a will, yet there must be words used to support the intent of the Testator, for wills must be ruled by the rules of the Common Law. Ashinghurst and Curtice his case, Mich. 7 Iac. Hob. rep. 34. the last Edition. Mich. 42 & 43 Eliz. Banc. Reg. a devise of Lands extend not to tithes, for tithes are not lands, but a meer collateral thing to them, and have no relation to them, Mich. 1. Iac. rot. 192. Mills and Hides case, Banc. Reg. 11 Rep. Bridle and Napers case, f. 13. b. Trin. 42 Eliz. B. Reg. Sherwood and Winston held, that tithes cannot be appendant to a Manor, 1 Rep. 111. Albanies case, and here are no words in the Proviso to pass the tithes. It is true that tithes may lie in tenure, and that an Action of debt lies for them, but that is by the Statute 19 Eliz Dyer f. 354. The word land in a will doth not extend to tithes, and heirs ought not to be dis-inherited by doubtfull and ambiguous words, as it must be here, if these tithes should pass. Next, as to the verdict, he said, that it is not thereby found that the Testator died possessed of the tithes, as it ought to have been, as it hath been adjudged 43 Eliz. and so he prayed judgement for the Plaintif. Maynard of Counsel with the Defendant argued, That the tithes did pass by the Will, otherwise part of the Will must be void, which ought not to be, if all parts may be so construed that they may stand together, and he agreed that lands and tithes are distinct things; but in Wills it is not to be so much considered whether the words of them be proper, but what was the intent of the Testator in them, and whether they do declare his meaning or not; and here by construction of the words by free-lands inheritance is meant in opposition to Copphold lands, or terms for years. 2ly. Here is a positive assertion of the Testator himself, that in his understanding he had free lands in Holford, for he had no other lands there, 35 Eliz. Robinsons case, rot. 504. Banc. Reg. by a will things of one nature may pass by words which are proper to pass things of another nature, 44 & 45 Eliz. rot. 125. A devise of lands and tenements will pass leases for years, if there be no other lands, to pass by those words in the place expressed in the Will, and so prayed Judgement for the Defendant. Roll Verdict. chief Iustice asked what he said to the exception, that it is not found that the Testator dyed seised of the tithes, without doubt it had been ill upon a Demurrer, therefore see if you cannot help it by the notes by which the Verdict was drawn up. But for the matter in Law, me thinks it is a strong case that the tithes do pass, for we are in the case of a Will, where the meaning of the party shall be observed, if it may be found out by any means, though it cannot be collected ex vi Terminis, and should it not be so here, part of the Will would be void, which may not be, if we can make it otherwise by a reasonable construction. But I will consider of the Verdict, and do you consult with your notes. Ierman Iustice, The Verdict ought to find the dying seised, and till I am satisfied from the Notes I will deliver no opinion. Nicholas Iustice held both the devise good, and the Verdict also, but said it had been otherwise upon a Demurrer. Ask Iustice to the same intent. Ierman Iustice, It is clear that the Testator intended to devise the lands in Holford, and it is a good devise, but if the Verdict be imperfect it is for the Plaintif, but if otherwise it is for the Defendant. The Court would advise touching the Verdict. Demurrer.

Hay-

Hayward against VVilliams.

Trin. 1651. Banc. sup.

Hill. 1649. rot. 824.

Who may bring a Writ of Error, who not.

THe Case was this, a Feme was sued as a Feme sole, but by the Sirname of her Husband, she being then Covert. The Feme appears and pleads, and Judgement is given against her, and the Baron and Feme joyn in a writ of Error to reverse this judgement: The question was, whether the Baron, who was a Stranger to the Record, might joyn in the writ to reverse the Judgement? It was moved divers times, and the Court advised, and at last they said, that a Stranger to a Record may not bring a writ of Error to reverse it, but that is only where he may have another remedy to avoid the prejudice he may receive by it; but in this Case the Baron hath no other remedy, for his Wife is taken in Execution, and by this means he shall lose her society; And therefore reversetur, nisi, Antea, 254.

Shann against Bilby.

Trin. 1651. Banc. sup.

Hill. 1650. rot. 1065.

Arrest of Judgement in an Action upon the Case upon a promise.

SHann brought an Action upon the Case upon a promise against Bilby, and declares, that in consideration that the Plaintif should surrender a Copphold unto I. S. and his heirs, according to the Custom of the Manor, the Defendant did assume and promise to pay unto him 100l. and that he did surrender the Copphold into the hands of a Customary Tenant of the Manor, according to the Custom of the Manor, to the use of I. S. and his heirs, and that the Defendant had not paid the hundred pound according to his promise, and declares to his damage, &c. Upon non Assumpsit pleaded, and Issue thereupon joyned, a Verdict was found for the Plaintif. It was moved in Arrest of Judgement by Latch of Counsel with the Defendant, that the Declaration is not good, 1. Because it doth not set forth to whom the promise was made, and if it do not appear to be made to the Plaintif, it is nudum pactum, for the promise here is the consideration. 2ly. The Consideration is Executory, and the Plaintif doth not shew that he hath performed it, and then he hath no cause of Action; The Consideration was, that the Plaintif should surrender a Copphold to I. S. and his heirs, according to the custom of the Manor; and he only shews that he did surrender the Copphold into the hands of a Customary Tenant, according to the Custom of the Manor, to the use of I. S. and his heirs, and doth not shew that this surrender was presented at the next Court, and so it appears not to be a good surrender, for it is uncertain whether it shall be presented or no, and till it be presented it is imperfect: To which the Court assented, and ruled against the Plaintif a Nil capiat per Billam, nisi, &c.

Surrender.

Covenant.

In this case it was said that if a man covenant to convey lands, it ought to be done at the charge of him that covenanteth to do it, except the contrary be agreed; And that if there be a double consideration alleaged for a promise, if one of them be good, and the other be not, yet an action will lie upon the promise that is broken, which was grounded upon these consideracions.

Consideration.

Bac-

Barcock against Tompson.

Trin. 1651. Banc. sup.

Mich. 1650. rot. 444.

A Writ of Error was brought by the Bail to reverse a judgement given against him upon a scire facias, & the Error assigned was, that there was no Capias taken out against the principal, and therefore the scire facias against the Bail is not good. Hales answered, that it was too late to urge this now for Error; for the judgement is upon two nichils returned, and cited 21 E. 3. f. 13. Roll chief Iustice said, that two nichils is as much as a scire feci returned, and it is no Error to give judgement upon it; but it had been a good plea upon the scire facias to say that there was no Capias against the principal, but now there is a Judgement well given, and it is too late to assign it for Error. But the Court advised. Postea. Error brought by the Bail. Plea.

Kerman against Iohnson.

Trin. 1651. Banc. sup.

Trin. 1649. rot. 153.

KErman brought an Action of Trespass and Ejectment against Iohnson, and upon a special Verdict found the Case was this. A man devised to I. S. his whole estate, paying his debts and Legacies, and dies possessed of Goods and Chattels, to the value of five pounds only, and dyed also seised in fee of divers lands, and was indebted forty pounds at the time of his death. The question was, whether the lands passed by the Devise? Barry of Councel with the Plaintif argued, that the lands did pass, because that wills ought to receive a favourable construction: And 2ly. The intent of the Testator is to be considered, who by the words all his estate, did mean to comprehend as well his land as his goods and chattels, for there is no restraint of the words here, 7 Ed. 3. 10. The word estate is a word of large extent, and extends as well to the real as personal estate, if it were in Case of grant, much more in the case of a Will. And there is another word used here to explain the Testators meaning to be to devise his lands as well as his goods, and that is the word All, which comprehends all manner of estates, without exception. Next if the land should not pass, his debts and Legacies cannot be paid, according to the express intent of the Testator, and the intent of the party ought to be satisfied, although the words be not proper, because it is in a will, though it might be otherwise in a grant. And whereas it is objected that the Iuries finding of the value of the debts and Legacies, is to no purpose, because the will cannot be helped by the averment of the Jury. I answer that averments if they stand with the will, may be received to make the Testators intent to appear. But besides this is not an averment only, but a true stating of the Case, to the intent to find out the Testators meaning. 3ly. The devisee of the land is not made Executor, but Trustee, or Devisee, & this is since the Statute of Devises 32 H. 8. The 2. question is, what estate the Devisee hath in the lands? I conceive he hath Fee-simple, because he hath all the Estate, which must be the largest, and that is Fee-simple. Hob. rep. pl. 280. The word whole goes both to the quantity and quality of an estate also. And here the consideration Special verdict in Trespass and Ejectment.

ration that he is to pay all his Debts and Legacies, is a good consideration to pass the fee-simple of his lands, and though there may be a surplusage after the Debts and Legacies paid, this hinders nothing; for it is his intent that the Devisee shall have that surplusage, and so he prayed Judgement for the Plaintif. Twisden for the Defendant argued, that either nothing passeth by the Will, or if any thing, then only an estate for life passeth. He agreed that improper words may sometimes pass things, yet sometimes proper words will not passe things; viz. if the intent of the party appear to be contrary, 24 Eliz. in the Earl of Northumberlands case. A Devise of all his Jewels, did not pass his Collar of Esses, and his Jewels annexed to his Parliament Robes, and the words here are not that he deviseth all his estate in his lands, but his whole estate generally, and if the words here should pass the lands, yet the fee simple passeth not, but only an estate for life in the lands, which do pass; nor do the words paying his Debts and Legacies cause the Fee-simple to pass, for here is no likelyhood of any loss to the Executor; for the words are not, that he shall pay all his Debts and Legacies; and if he be an Executor, as the contrary appears not, he shall not be charged with more than the personal estate will discharge. The words do amount to a Condition, and it is not found that there are any Debts or Legacies paid, and so it is not performed, and the heir may well enter into the lands in question, for the Condition broken. 2ly. The Verdict doth not find how the lands are held, whether in Socage, or by Knights service; and so it appears not whether they can be devised or no, and they shall not be intended to be Socage lands, Dyer, f. 207. Hill. 32 El. rot. 2. and Pell and Browns case. 3ly. It is not found that the Testator dyed seised of the lands, as it ought to have been, and he prayed Judgement for the Defendant. Roll chief Justice to the second Exception to the Verdict answered, that in a Special verdict it is not necessary to find whether lands be held in Socage, or by Knights Service, and he said that the words in the Will do goe to the nature and extent of the estate, as Barry urged, and he doubted how the verdict shall supply the Will if it be defective, for that is only to make the intent of the Will certain. Adjourned to be argued again. Postea.

Special Verdict.

Marshal against Ledsham.

Trin. 1651. Banc. sup.

Arrest of Judgement in Debt.

MArshal as Administrator brings an Action of Debt for rent; and upon a Verdict found for the Plaintif, the Defendant moved in Arrest of Judgement, and takes exception, that the Plaintif had not shewn by whom the Letters of Administration were granted unto him, as he ought to do, but only says that the Administration debito more commissa fuit. But it was answered that it is too late to move this Exception after a Verdict, for the Jury have now found that the Administration was duly granted, and the Letters of Administration were produced in Court, and therefore not necessary to shew who granted them; and it was said, that in a Declaration it is not necessary to shew by whom Letters of Administration are granted, or to say they were granted by him, Cui pertinuit, or per loci illius Ordinarium: But in a Plea in Bar it is otherwise, for this is not the cause of the Action, and effect of the fute, but to shew they have been in the Spiritual Court. Judicium nisi pro quærente was afterwards given: Antea.

Declaration.

Plea.

Giles

Giles against Timberley.

Trin. 1651. Banc. sup.

Mich. 1650. rot. 176.

A Per Ejectione firmæ vi et armis was brought in the Common Pleas, and a judgement given for the Plaintif upon a nihil dicit, and in a writ of Error brought in this Court to reverse the judgement, the Error assigned was in the judgement, which was entred thus, Ideo consideratum est quod recuperet, and the word Capiatur was omitted, which ought not to be, because the Action is a Trespass vi et armis. Roll chief Iustice said, It is an ill course they use in the Common Pleas, to enter the judgement so in this Action, for by this course the Plaintif shall gain his possession of the land, and the Defendant cannot bring his writ of Error until the writ of Enquiry returned, and the Judgement perfected, which it may be will never be; for when the Plaintif hath gotten possession of the lands he will little regard the damages. Therefore let the judgement be reversed. Antea.

Error to reverse a judgement in an Ejectione firmæ.

Iudgement.

Error.

Elyott against Blague.

Trin. 1651. Banc. sup.

ELyott brought an Action upon the Case against Blague for speaking these words of him, viz. Thou art a Bastard getting Rogue, and hadst a Bastard at Oxford, and art a pocky rogue, and for ought I know thou hast filled my Bed full of the French pox, and no such pocky rogues shall lie with me: Upon not guilty pleaded, and a Verdict found for the Plaintif, it was moved in Arrest of Judgement that the words were not actionable, because some of them were adjectively spoken, and others uncertain, and some of them clearly not actionable: But Twisden answered, that if the words were taken together as they were spoken, they were very scandalous and actionable, and cited one Colyers and Lydyers case, 1 Car. To which the Court agreed, and ruled the Plaintif to take his judgement except better cause should be shewn.

Arrest of Iudgement in an Action for words.

Custodes against Ginkes.

Trin. 1651 Banc. sup.

SErjeant Bernard moved to discharge an Order of Sessions made against a Feme Covert, to keep a Grand child of hers, because a Feme Covert was not bound by such an Order. Roll chief Iustice answered, that her Husband is bound to keep his wifes Grandchild by the Statute; but in regard that the Husband is not charged by the Order, but the wife who is covert is only charged, Therefore let the Order be quashed.

To discharge an Order of Sessions.

Order of Sessions.

Trotman against Standard.

Trin. 1651. Banc. sup.

Trin. 1650. rot. 1768.

Special verdict in an action on the case.

IN an Action upon the case a special verdict was found, upon which the case fell out to be this. Two being seised of lands in Fee, did make a charter of feoffment unto two others, and to their heirs, and in the deed was a letter of Attorney to enter into the lands in the name of the feoffors, and make livery and seisin according to the effect of the deed, and livery of seisin was made to one of the Feoffees by the Attorney in the absence of the other Feoffee. The question was, whether here were a good livery and seisin, or not? 2ly. Whether the letter of Attorney was good or no, in regard it had false latin in it, for the letter of Attorney was made by two, and the words of it are pro me, & in nomine meo to make livery which are words of the singular number, whereas they ought to be of the plurall? Hales as to the 2d. question held the letter of Attorney good enough, because the authority given to the Attorney proceeds from both the Feoffors, and therefore the words shall be intended to be the words of both of them, as spoken by them severally. And he also argued that the letter of Attorney was well executed to both the Feoffees, because it was by deed, and he cited 15 E. 4 f. 18. and he said, if the livery had been made by the Feoffor himself it had been good without question, and there is no difference between that and our case, because it is made according to the effect of the deed, and the Feoffee who is present is Attorney for the Feoffee that is absent to receive livery for him, and the effect of the letter of Attorney is executed, although the words are not, Cooks Lit. f. 5. and Hoxon and Polts case, in the Exchequer, 34 Eliz. Boltons case, Livery made to the husband, was held a good Livery to the wife also. Latch of Counsel on the other side made two questions. 1. Whether here was a good authority? 2ly. Whether it was well executed? For the first he argued, that here was no authority given to the Attorney to enter into the lands in the name of both the Feoffors, for the words are that he should enter in nomine meo, which cannot comprehend both of them, the words being in the singular number, and he agreed that Livery made by the Feoffor himself to one, in the name of both had been good; but here the livery is by Attorney, and an Attorney hath nothing but a bare authority given him, which ought to be strictly pursued, especially it being to passe away an Estate. He also took exceptions to the special verdict, and said that the tryal upon which the verdict was found, was directed out of the Chancery to discover a fraud, and the verdict finds nothing according to the direction, and so it ought to be set a side, besides the verdict in it self is incertain, for it is of 300 Acres of land generally, which is incertain, and so the Plaintiff can have no Judgement, for the Declaration warrants not the verdict, for the Declaration mentions Houses, and Cottages, besides the 300 Acres of land. 2ly. The verdict doth not find the date of the Indenture, and the Title to the land is to commence a die datus. Hales answered 1. It shall be intended the day of the date. 2ly. It shall take effect after the delivery, if there be no day of the date expressed. And to that exception to the verdict, that there are not so many Acres contained in it, as are expressed in the Declaration; he answered that the Judgement shall go to all which is land in kind only, and shall not extend to Houses, and Cottages, and there appears to be a re-

residuum, or surplusage. Roll chief Iustice said, that it is incertain by the verdict what lands are meant, for there are 400 Acres of land, and four messuages, and four Cottages, and 40 Acres of medow in the Declaration, and so there appears to be a residuum, besides the land found in the verdict, which makes it to be incertain what is found. And though it should be a verdict for part, and be uncertain for the rest, although the Plaintiff will relinquish his damages for the rest, this will not help it, for there must be two Iudgements, and the verdict is ill as to that which is found, yet he held that it might be good without relinquishing the damages at all, because the verdict is good for so many Acres as are in the Declaration, and it shall be intended that the Jury mistook the number of the Acres, and intended by the verdict no more than the arrable land. Ierman and Nicholas Iustices doubted whether there be a verdict at all, because the Jury have not found the things conteyned in the Declaration. Roll chief Iustice, and Nicholas, mutate opinione, held the verdict good; but said it would have been otherwise upon a demurrer, and it was said that if one declare for 40 l. and the verdict finds 100 l. the Plaintiff may relinquish 60 l. and have Judgement for the rest. Ask Iustice said that his opinion was, that the verdict is incertain, and conceiveth that the Jury intended all in the Declaration. The Court took time to advise. Afterwards Iudgement was given for the Plaintiff. Verd. &.

Fitton against Richardson.

Trin 1651. Banc. sup.

The Court was moved for a prohibition to the County Palatine of Chester, upon a surmise that they did proceed in the Court of equity at Chester touching the payment of rent reserved upon a lease for years, which is a matter tryable at the Common Law, and not in a Court of equity. The Court answered we will see the Bill, whether there be any matter of equity said in it or no, for if there be we will not grant a prohibition, and let us also see some presidents if there be any, for granting of a prohibition in such cases. Powis who moved for the prohibition replyed, That in Chester they hold two Courts, one for matters of Common Law, and another for matters of equity, and so they ought to observe the due proceedings in each Court, according to the nature of the cause, 2ly. This Court of the upper Bench is the superintendent Court over all other Courts, and a writ of Error lyes out of this Court to Chester, and by consequence a prohibition also to restrain the Court of equity there, if they shall proceed irregularly. 3ly. There would otherwise be a failer of justice, for the Court of Chancery here cannot grant a prohibition, because the matter they proceed in there is no matter of equity, Nat. brev. f. 44 H. I. Cook rep. Corbets case, Hob. rep. case 98. Owen and Holts case. And though a writ from hence doth not run there nor in Wales, yet a prohibition is grantable to Wales, and therefore why not to Chester, Mich. 2. Jac. B. R. a habeas corpus was granted to the County Palatine of Durham; and to Barwick, and Trin. 1650. C. B. rot. 1966. in Iones and Lennards case a prohibition was granted to Chester. Nicholas Iustice cited a case to be adjudged in this Court by Cook chief Iustice that it will not lye de brevi ordinario; but in Wales it will ly, Hales answered, that there is more here than matter of equity, and writs mandatory will lye in all places. Roll chief Iustice said that Chester hath a Court of upper Bench, and they may grant a prohibition there, and it appears not to us whether they will grant it or not, For a prohibition to the County Palatin of Chester. Prohibition.

so that we know not whether we need to intermeddle. Hales replyed, that every one is bound by the Common Law, and therefore writs mandatory at the Common Law, which generally concern men as subjects, and not concerning private things. And 1. It is to be considered that Chesters jurisdiction is derived from this Court, and so it is supposed to be subordinate to it, and is to be regulated by it. 2ly. When the matter concerns common right, it is not affixed to Chester, because it concerns men as subjects at large, 20 Iac. Grigs case, C. Banc. And this Court sat in Chester in the 22 year of Ed. 1. as may appear by the roll, Hill. 31. Mich. 29. E. 3. rot. a habeas corpus was granted to Durham, and the liberty seised into the Kings hands for disobeying it, and this Court is the conservator of the liberties of Chester. Roll chief Iustice demanded, can we grant a prohibition to the Court of equity in Ireland? If there did appear to be any failer of Iustice here, we would grant a prohibition; but there appears not any failer, for it may be the party may have a prohibition in the upper Bench there. Therefore it is good for us to hear the other party, and in the mean time we will advise, and then let us see the bill in Chancery. In this case Hales said that a prohibition had been granted to the Lord Majors Court of London.

Prohibition.

Style against *Tullye*.

Trin. 1651. Banc. sup.

Hill. 24. Car. rot. 587.

Error to reverse a Iudgment in debt upon an obligation.

Sir Humphrey Style brought a writ of Error to reverse a Iudgement given against him in an Action of debt upon an obligation in the Common pleas for Tullye and Acton Executors of the last Will and Testament of one William Tullye. The case was this, Sir Humphrey Style, and one Thomas Brook were joyntly and severally bound unto William Tullye, in an obligation of 120 l. for the payment of 60 l. at a certain day. After the day of payment, and the mony not paid, Thomas Brook makes his Will, and makes Mary Brook his wife his Executrix, and dyes, afterwards William Tullye makes his will, and makes Tullye and Acton the Defendants in the writ of Error his Executors, and dyes, and by his will he releases unto Mary Brook all the debts, which Thomas Brook her husband, did owe unto him at the time of his death. Tullye and Acton prove this will, and after bring an Action of debt against Sir Humphrey Style in the Common pleas, upon the obligation of 160 l. Sir Humphrey Style demurs to the Declaration, and for cause shews that William Tullye by his will, had released the Debt to Mary Brooks, and upon this demurrer Iudgement was given against Sir Humphrey Style, and thereupon he brings his writ of Error; wherein the question was, whether the debt was released by the will or no? Latch of Councel for Sir Humphrey Style argued, that here was an actual release, and he cited 21 E. 4. f. 8. and a case Trin. 10. Car. and said that a will amounts to a release, although it be not made of incorporeal things, and the assent of Mary the Executor is not necessary here, for this is not like the assent to the accepting of a Legacie, and a debt due upon an Obligation made to the Testator, is not assets in the hands of an Executor, untill it be recovered, and this is more than in the nature of a Legacy, and here was a great personal Estate, and no other creditors are deceived by this release, and a devastavit cannot be here suppose, 19 H. 8. Dyer 8 E. 4. f. 5. Dyer 139. Cranmers Case, and here is only an exoneration of a thing,

and

and no donation of any thing by this releaſe, Serjeant Hen. Clark of Counſel on the other ſide argued, that the debt was not diſcharged by the will, becauſe this releaſe made by the will cannot take effect till after the death of the Teſtator, and ſo not at all, and ſuch a releaſe was revokeable by the Teſtator during his life, and therefore it cannot be ſaid that it was ever an abſolute releaſe; But if this releaſe had been in the realty, it might peradventure have been otherwiſe; but it is not ſo here; for the debt now reſts in the Executor, and it is a devaſtavit in the Executor to releaſe it, for this is but a Legacie, and it may be there are debts owing, which are to be paid before Legacies, and here doth not appear to be any aſſets in the Executors hands, beſides this debt, and if the Teſtator would have releaſed it, he ought to have done it by a deed. Roll chief Iuſtice, What ſhall the Executor do in this caſe? I conceive it is a ſtrong caſe for the Executor, and that it is very unreaſonable that the Teſtator ſhould make ſuch a deviſe, and here is no conſent of Mary the Executor expreſſed to this releaſe, beſides a will cannot releaſe a thing created by deed, and ſo diſcharge Creditors. Nicholas and Ask Iuſtices concurred; But Ierman Iuſtice doubted. For a fault in the writ of Error, and imperfection in the record certified, the Iudgment was not then affirmed. Afterward Sir Humphrey Style preferred his bill in Chancery to be relieved herein, and obteyned an injunction till hearing; but upon a hearing at the Rolls could get no relief; but was ordered to pay 100 l. or elſe the injunction to be diſſolved. Q. Nota.

Hamond againſt Ward.

Trin. 1651. Banc. ſup.

Paſc. 1650. rot. 58.

AN Action of debt was brought againſt the Defendant, upon an inſimul Computaverunt, and a verdict and a Iudgement given againſt him, whereupon he brought his writ of Error, and aſsigns for Error, that the Action was brought againſt him for rent as a Tenant of land, and not as a receiver, and that therefore an accompt did not lye. Roll chief Iuſtice cited 20 H. 6. that rent alone lyes not in accompt, becauſe rent is a certain thing, and it is alſo in the realty; but if rent be mixed with other things an accompt will lye; but here it appears the Action is brought againſt the Defendant as a receiver, and if one receive mony due to me upon an obligation, I ſhall have either an Action of accompt, or an Action of debt againſt him, ſo if he receive my rents without my conſent. Therefore let the Iudgement be affirmed.

Error to reverſe a judgment in debt upon an inſimul computaverunt.

Accompt.

Debt.

Alleyn againſt Holden.

Trin. 1651. Banc. ſup.

Entred Paſc. 1650.

AN Action of debt was brought againſt an Heir, who pleads riens per diſcent, & Iudgment was given againſt him upon a nihil dicit, & a writ of enquiry was awarded without the prayer of the party, and a ſpecial Iudgement thereupon given againſt the Defendant. Upon a writ of Error brought to

Error to reverſe a judgment in debt againſt an Heir.

to reverse this Judgement, it was alleaged for Error, that the Judgement ought to have been a general Judgement, and there ought not to have been a writ of enquiry, except the party had prayed it, and to this the Court enclined, and Roll chief Iustice said, that it is otherwise in an Action against an Executor, for there assets may be found. At another day Roll chief Iustice said, if the Heir plead riens per discent, and if it be a false plea, a general Judgement ought to be against him, and there shall be no writ to enquire what lands he hath, and it is not necessary, as here it is, to have a special Judgement, that the Plaintiff shall recover of the lands discented, for the Judgement ought to be that the Defendants body and goods be lyable, and half his lands, and not as it is here a writ to enquire, and find what lands he hath by discent. Reverset. nisi.

Writ of inquiry.

Iudgement.

Barcock against Tompson.

Trin. 1651. Banc. sup.

Error brought by the Bail to verse a judgment given against the principal.

This case was again spoken unto, which was this, A Judgement was given in the Comon pleas against the principal without an original, upon this Judgment there issued out a scire facias against the Bail, two nichils returned, and thereupon Judgment was given against the Bail, a writ of Error was brought by the Bail to reverse this Judgment. And it was now argued by Hales of Councel for the writ of Error, that the Judgment was erroneous, because it being given upon a scire facias, which is a judicial writ, it ought to be grounded upon an original, and it not being so here, it is Error in fact, although it be not Error in Law. To this it was answered, that two nichils returned upon a scire facias, amount to a scire feci, and a judgment given thereupon is good, and therefore it is too late now to say, that the scire facias was not well executed. Brook Sc. fac. 96. 28. 17 Car. C. B. To this Hales said, there was a Judgement against us in the Common pleas, so that we could urge nothing against the scire facias there; but here we may. Roll chief Iustice answered, it is to some purpose to make up the record upon the two nichils, otherwise there would be no end of things, and the Judgement is well given by the Judges, and how can you now make Error in it? and if you be inconvenienced by the Judgement, you are not without remedy, for you may bring an Audita querela, and you might have pleaded to the scire facias, nul tiel record, for it is not matter of fact. And therefore shew better matter why the Iudgement shall not be affirmed, and take liberty to bring an Audita querela. Antea.

Iudgement.

Error.

Audita querela.

Tucker against Cosh.

Trin. 1651 Banc. sup.

Entred Trin. 1650. rot. 388.

Special verdict in a replevin.

Tucker brought a replevin against Cosh, for distreining his Cattel. The Defendant makes conusance as Baily to I. S. and upon the Avowry the case fell out to be this. A tradesman, in consideration of marriage, made a conveyance of his lands to the use of himself, and of his wife, and afterwards becomes a Bankrupt, and a commission of Bankrupt is taken out against him, and the lands of the Bankrupt are sold by the Commissioners to the avowant that took the distress. The question here was, whether

whether this conveyance made by the Bankrupt of his lands was within the Statute of fraudulent conveyances or not, and the sale made by the Commissioners of this land were good. Maynard for the Plaintif argued, that it is not within any of the Statutes of Bankrupts. The Deed here is without fraud; and so it is not within the Statute; for a valuable consideration is only expressed in the Statute, and not a conveyance upon consideration of marriage, as it was in our case. 2ly. The Feme is but one person with her Husband. 3ly. By comparing the Statutes together it appears that the wife is not compelled within the Statute of 1 Iacobi, which looks back to other Statutes touching Bankrupts, for the wife is not named in the Statute of 1 Iacobi, but only children and other persons, otherwise the words of the Act which do enumerate children, and other persons, would be frivolous and idle. Roll chief Iustice said, the Case is of great consequence, and Crisp and Prats case doth somewhat resemble this. The Law intends a Bankrupt which is so by fraud, as well as a Bankrupt who becomes so by accident, and for this cause is he called an Offender in the Statute, and here the year of our Lord 1637. is the 13 year of the late King; & the recovery suffered by the Bankrupt was then, and within half a year after the recovery, he became a Bankrupt, so that me thinks there plainly appears to be fraud in the Conveyance, but the fraud is not expressed in the pleading, as it might have been. The Statute of 1 Iac. is somewhat doubtfull as I conceive, and I do not see any provision made in it against the wife, if fraud do not appear, for here is no valuable consideration mentioned. Nicholas Iustice said, it is doubtfull, yet he conceived it within the Statute of 1 Iac. which ought to receive a large construction, because it was made for the good of the Commonwealth. Ierman and Ask agreed with Roll in omnibus. Roll, Here the matter in dispute is not in a special Verdict, but comes in question upon point of pleading, which shall be taken most strong against him that pleads it, and he hath not expressed any valuable consideration, as he might have done, by saying in consideration of a portion, or in recompence of marriage, or in performance of Articles made upon marriage, or that the wife had joyned in selling some part of the land. The Court would advise, but enclined judgement ought to be for the Avowant. Afterwards judgement was given accordingly, for the Court held the wife was within the Statute of 1 Iac. and the providing for wife and children to be providing for himself.

Bankrupt.

Fraud.

Pleading.

Chapman against Brook.

Trin. 1651. Banc. sup.

Trin. 1650. rot. 200.

IN an Action upon the Case the Plaintif declared upon a Custom of commoning in such a place. The Defendant demurred to the Declaration, and for cause shews that the Custom was not well laid; for the Plaintif declares of a Custom of commoning, pro averiis, viz. pro equis, bobus, equabus et pullis, and the word pullis is of an uncertain signification, for it may signifie a Calf, a Lamb, or any other young Beast or Foul, and 23 Car. Segar and Dyers Case was cited. The Court held the exception good, and said, that it is uncertain what is meant by the word pullus, and said, that if the prescription had been pro omnibus averiis, it had been good, and the viz. should have been void; but here it is only pro averiis. Therefore, nil capiat per billam.

Demurrer to a Declaration in an Action on the Case.

Prescription.

Newton againſt Godard.

Trin. 1651. Banc. ſup.

Error to reverſe a judgement in debt.

A Writ of Error was brought to reverſe a judgement given in an Action of Debt at Ipſwitch. The Caſe was this. There iſſued out a Capias againſt the Principal, and a judgement was given againſt him; and after a ſcire facias iſſued out againſt the Bail, and a judgement thereupon was given againſt the Bail; Then the Plaintif takes out an Execution, viz. a fieri facias againſt the Principal, and Bail, upon both the judgements, to levy the debt recovered upon the goods and chattels of the Principal and Bail, or either of them. It was alleged that the execution thus taken out was not good, for there ought to have been ſeveral executions upon the ſeveral judgements, and not one execution, and to this the Court agreed, and ordered the Defendant in the writ of Error to ſhew cauſe why the judgement ſhould not be reverſed. In this Caſe Roll chief Iuſtice took an exception to the ſcire facias, becauſe it was ſcire fac. with a dash, which might be as well ſcire faciatis as ſcire facias.

Execution.

Abreviation.

Spittlehouſe againſt Farmery.

Trin. 1651. Banc. ſup.

Hill. 1650. rot. 43.

Error to reverſe a judgement given in an Action of Accompt.

An Action of accompt was brought againſt a Feme Covert an Adminiſtratrix and her Husband in the Common Pleas, and judgement given againſt the Defendants quod computent. The Feme dies, and the Husband brings a writ of Error in this Court to reverſe this Judgement. Roll chief Iuſtice held, that the writ of Error did not lie, becauſe the Record cannot be removed by it, for that would diſturb the proceedings in the Common Pleas, and the party would have no fruit of his ſute, if the Record ſhould be removed, nor any remedy to recover the arrears due unto him: Yet the Original is determined by the Judgement given quod computent, and a ſcire facias lies by the Executor, as the caſe here is. Ierman Iuſtice to the ſame effect, and cited 1 H. 7. f. 2. Nicholas Iuſtice to the ſame intent; and ſaid, he did not much regard the Book of 21 Ed. 3, becauſe there are other Books againſt it. Ask Iuſtice ad idem. Roll chief Iuſtice put theſe caſes. A judgement was given in Dower for the Demandant, and another judgement that ſhe ſhall recover her damages, and this ſecond judgement for the damages was reverſed by a writ of Error, becauſe ſhe did not aver that her Husband died ſeiſed, in which caſe ſhe is to have no damages; yet the firſt judgement for the Dower ſtood unreverſed, and Hill. 43 Eliz. C. B. in one Williams and Whites caſe, in an Action of Accompt 2 judgements were given, and the ſecond was reverſed, and the firſt ſtood unreverſed. In the principle caſe the rule was judicium, niſi.

Original. Scire facias.

Iudgement.

Wallis

VVallis against Bucknal.

Trin. 1651. Banc. sup.

Trin. 1649. rot. 600.

Special verdict upon a Custom of a Manor.

VPon a special Verdict the case fell out to be this. One seised of Copyhold lands of inheritance made a Letter of Attorney unto two joyntly and severally, to surrender the lands after his death to certain uses, according to the Custom of the Manor. The question was, whether this was a good Custom or no. Ellis of Councel with the Plaintif argued, that it was not a good Custom, because a Custom ought to be reasonable, but this Custom is unreasonable; because it is not only against a particular Law, but it is against the general rule of Law to pass estates of inheritance in such a Manor; and although particular Customs may be against publique interest pro bono publico, yet this is nothing to our case, for this is not for the publique good, and therefore it is not good. 2ly. An authority ought to be countermandable, and to determine by the death of the party that gives the authority; but here it is not so, but it is to continue after his death. Next, no man can give authority to another to do a thing which he himself could not do, but here it is otherwise, and therefore it is not good. Also by the death of the Copyholder the Law settles the lands in the heir, and an authority cannot divest them out of him; this is not like to the surrendring of Copyhold lands into the hands of the Lord, for such a surrender cannot be revoked, but this authority may be revoked: But which is more, the Verdict here doth not find that the two Attorneys are customary Tenants of the Manor, but only by way of recital, which is not good; for they ought to have been found so directly; nor doth it appear that they were customary Tenants at the time of the admittance of the party, neither is there any possession or title found in the Defendant, and so the Plaintif having primer possession, the Defendant is culpable; neither is it found that the Customary Tenant, who gave this authority, had an estate in fee-simple in the lands, and if he had but an estate for life, he could not make such a Letter of Attorney; neither is the authority given warranted by the Custom; and so he prayed judgement for the Plaintif. Wilmot for the Defendant, As to the authority, he said that it was good, and did well enough survive the party that gave it, because it is supported with a special direction from the party that gave it. 1 H. 7. 8. and this is the reason that an Executor may sell lands of the Testator after his death, viz. because his authority is so supported, 21 E. 4. f. 8. 31 E. 1. Fitz. Grants 45. And here in our case the heir hath neglected his advantage, and therefore shall not now be admitted to take it. But besides the authority here given is more than a bare authority, for it is backed with the circumstances of time, persons, and of a Custom, which is not of a slight esteem in Law, and by such a Custom which is very reasonable; for it is but to enable the party to dispose of his own lands; and far more unreasonable Customs than this are allowed in our Law, as that in Kent for an Infant of 15 years of age to have power to sell his lands; neither is this Custom contrary to any positive rule of Law; for it is here to create the authority to begin after the parties death that created it, and so it is not to determine with his death, for till then it begins not, and the Custom here is but to alien lands, which is no strange thing, and this Custom extends but within the Manor, which is but to a small compass of ground; and so

the publique is not much concerned in it, and the case of 17 Car. in this Court, Bambridge and Whaddons case differs from our Case; for that was not supported with a custome as this is. And it doth appear by the Record, that Dalby the Attorney is a customary Tenant, and the admission is also found by the Verdict to be secundum consuetudinem Manerii, and so that is well enough, and then one cannot gain a Copyhold estate by disseisin, and so no primer seisin shall be intended, as was urged on the other side, and it is also found that the Copyholder was seised. Roll chief Justice, It will be a hard matter to maintain the Custom, if it be not found that the Copyholder was seised in fee of the Copyhold lands. 2ly. It is not here found that the land is demisable, according to the will of the Lord, and so it may be free land, and then the custom doth not extend unto it, nor is it found that the parties to whom the Letters of Attorney were made were Copyhold Tenants. And the primer possession will make a disseisin here by the Defendant, if the custom be not well found, and so judgement must be for the Plaintif. And I cannot see how the Custom can be good, it being against the rules of Law. A man cannot devise Copyhold lands, and this case is worse, but he may surrender to the use of his last Will. If you will not consent to a new tryal we will advise, for it is a hard case, and my Brothers have not been attended with Books. Mich. following Iudgement was given for the Plaintif, nisi. It was moved again, and the Court would advise. Postea.

Custom.

Disseisin.

Devise.

Surrender.

Batchelour against Parsons.

Trin. 1651 Banc. sup.

Mich. 1652. rot. 381.

Error to reverse a judgement in debt.

BAtchelour brings a writ of Error to reverse a Judgement given against him for Parsons in an Action of Debt in the Common Pleas, and the Error assigned was, that there are two Declarations in the Record, one in the Emparlance Roll, the other in the Plea Roll, and the Original certified upon the writ of Error doth not warrant the first Declaration, for it was filed after it. Hales answered, that the Record is good enough, if the Original do warrant the last Declaration, for this is the common course used in the Common Pleas, as the Clarks there do inform me, & there are many Cases like this in the Common Pleas. Wild of Council on the other side answered, that this is a strange course, for they ought first to file the Original, because it is the beginning and ground-work of the sute; and it not being so done here, the Judgement is given without an Original, & this is a judgement by default, and the imparlance is part of the sute. Roll chief Justice, The Imparlance Roll is the principal part of the sute, and to confound things by intendment, that the imparlance may be touching another sute, is not good, and it matters not what the Custom is in the Common Pleas, if it be against Law, and both Rolls ought to be certified here. Ierman Iustice ad idem. Roll chief Justice, All the Record in the Common Pleas, which is in the custody of the chief Justice there, ought to be certified by him upon the Return of the Writ of Error, and here the Imparlance Roll is in his custody, and therefore he ought to certifie it; and if there be two writs of Error, and one is good and the other naught, we will take the best to affirm the judgement. The Original ought not to be fitted to the Declaration, but the Declaration to the Original, because the Original is the foundation of the sute, and therefore the course used in the

Imparlance. Intendment. Certiorari.

Error.

the Common Pleas is a preposterous course, viz. to declare against the Defendant, and after to file an original against him, to warrant the Declaration. It is here certified to be one Record, and how can we take the emparlance Roll to be part of the Record, it being not certified with it: and if there be variance between the emparlance Roll, and the plea Roll, it is Error. We will advise; but we must not suffer new wayes, yet we are loth, notwithstanding to reverse Judgements given in the Common pleas. Therefore shew cause next term, why the Iudgement should not be reversed. Original. Variance.

Kirman against Iohnson.

Trin. 1651. Banc. sup.

IN an ejectione firmæ brought by Kirman against Iohnson a special verdict was found, and upon it the case fell out to be thus, A having lands in fee simple, and also goods and chatels to the value of 5 l. only in Tavestock, made his Will, and devised to his wife totum statum suum, viz. his whole Estate paying his Debts, and Legacies, and his Debts and Legacies did amount to the value of 40 l. Hales made 2 questions, 1. Whether the lands passe to the wife by the Will or not. 2ly. If they do, what estate passeth to her in the Lands. For the first he argued, that the lands do passe to the wife. 1. Because the generality of the words do include the lands, as well as the goods, for the words are his whole Estate, so that nothing is excluded, 9 E. 4. a release of all Actions, is held a release of all Actions that the party had in all his capacities. 2ly. The ordinary maner of speech doth shew that he intended to devise his lands, as well as his goods. Riches case, Mich. 45. Eliz. C. Banc. A devise of all his rents was held to passe all the partyes lands. Also the subject matter in fact doth prove this to be his intent, and although here is not a collateral averment to prove the intention, but a collateral proof to declare the Testators intent, this may be admitted to ascertain the Court of his meaning, as it is in the case of proving an Act of Parliament. In the Lord Cheneys case, an averment standing with a Will was accompted allowable, though an averment against a Will be not; In Cooper and Lanes case, 35 Eliz. a devise seigniori puero, where the Testator had a Son, and a Daughter, was held a good devise to the Son, although puer signifies as well a Daughter as a Son; and the Daughter there was elder than the Son, and Hill. 8. Car. In Bartlet and Rodes case in B. R. a devise of all his lands in Dale, if he had leases, as well as lands, there passed not the leases. For the 2d. point he argued that a fee simple passed. 1. Because his whole Estate is devised, and that is to be applyed as well to the lands, as to the goods. 2ly. Because in regard that there is a consideration for it, to wit that the wife shall pay his Debts, and discharge his Legacies; and whereas it is objected, that it is not said she shall pay all his Debts. I answer, that it shall be so intended. Here is land and goods mentioned, and not land only, and it is found that the goods only are not sufficient to pay the Debts, and also the goods were liable to the payment of the Debts, without this expression in the Will, and therefore the land must be intended to be devised. And for the verdict it is not material to find the lands to be held in socage, for they shall be intended to be so held, because it is the most antient Tenure, for where the Law creates a Tenure, it shall be socage Tenure. 2ly. Lands may possibly be deviseable, although they be not held in socage, for if they be neither held by socage, nor chivalry, yet they are devisable, Dyer 307. Special verdict in an ejectione firmæ.

Neither is it material to find the Debts, and Legacies paid, for it is a condition here, an not a limitation, and there is a person to take advantage if the condition be broken, & this is a special verdict, & the breaking of the condition if it had been broken, would have appeared upon evidence, & therefore it is not necessary to aver it, & it is in case of a Fee simple, which is an Estate intended to continue. Roll chief Iustice held, that the lands did passe, for so he said the common understanding imports, and the words do go to the value of the estate. 1. It comprehends the thing, to wit the land. 2ly. The extent of the Estate given, viz. Fee simple, and so it shall be here intended. and the words paying his Debts and Legacies doth enforce this construction, for they are to be paid presently, which cannot be, if the lands passe not in Fee, and so the averment it is but to supply the meaning of the Testator, and stands very well with the Will, and is not so collaterall, as it is in Cheyneys case. And for the verdict the lands shall be intended to be socage lands, as being the most Common Tenure, except the contrary were shewed on the other part, Denham and Bakers case, Mich. 24 El. entred Trin. 23. rot. 12. So. and the words paying his Debts, and Legacies, are words of condition, and not of limitation. Ierman ad idem, and said, when we say a man is a man of a great Estate, we mean his Estate in lands, as well as goods. Nicholas and Ask Iustices to the same effect; but Ask said he doubted of the verdict, because no Legacies are found, and this is part of the case. Iudicium pro querente nisi, Antea.

Devise.

Intendment.

Condition. Limitation.

Pickering and Emma.

Trin. 1651. Banc. sup.

For a supersedeas upon an audita querela. brought.

EMma obteined a Judgement against Pickering, and had satisfaction upon it, and gave a release to the Defendant, yet afterwards takes out a capias ad satisfaciendum against him, whereupon he brings his Audita querela, and moves the Court that he may have a supersedeas to the capias ad satisfaciendum. The Court desired to see the release, and upon view thereof, The rule was, that the party should proceed in his audita querela; but said they would grant no supersedeas, because the release was ambiguous.

Custodes &c. against Rivett.

Trin. 1651. Banc. sup.

Cause why an Attatchment should not be granted.

VPon a rule of Court to shew cause why an Attatchment should not be granted against one, for proceeding to a tryal in an inferior Court, notwithstanding a habeas corpus directed to remove the cause, An Affidavit was made, that the proceeding to tryal was, because it was supposed the habeas corpus was against the Statute of 21 Iac. The Court answered, you ought to have returned this matter upon your return. and not to have proceeded against the habeas corpus; but let the Secondary examine the matter, and then move again. But it is dangerous to execute the Iudgement; if the Statute be not against the habeas Corpus.

Return.

The

The Cuſtodes againſt my Lord Morley.

Trin. 1651. Banc. ſup.

THe Court was moved on the behalf of the Lord Morley for a Certiorari to remove an Endiament preferred againſt him at the Seſſions of Peace at Hicks Hall upon the Statute againſt hearing of Maſs. The Court anſwered, that they would adviſe, but that they did not ſee how a Certiorari could be granted at the prayer of the party, but they ſaid, at the prayer of the Counſel for the State it may be granted.

For a Certiorari to remove an Endictment. *1. Vent. 1. 63. 1. Mod. 41.*

Baker againſt Smith.

Trin 1651. Banc. ſup.

BAker brought an Action upon the Caſe againſt Smith, and declared, that whereas there was a ſpeech concerning mariage between her the Plaintif, and Smith the Defendant, in conſideration that ſhe the Plaintif would marry the Defendant, the Defendant did aſſume and promiſe to her the Plaintif, that he would marry her, and that afterwards the Defendant, in conſideration that the Plaintif would diſcharge the Defendant of this promiſe, the Defendant did aſſume and promiſe that he would pay unto her the Plaintif, a thouſand pound, and that ſhe did diſcharge the Defendant of his promiſe of mariage; and yet the Defendant had not paid the 1000 l. according to his promiſe. Upon non aſſumpſit pleaded, and a verdict found for the Plaintif, It was moved in Arreſt of Judgement that there is mention of two promiſes in the Declaration, and that it is incertain to which promiſe the Declaration relates. 2ly. That there is no temporal conſideration alleged, but only a promiſe to diſſolve a Contract of Mariage, which is a thing illegal, and ſo no conſideration. Roll chief Iuſtice anſwered, that here is a mutual promiſe made by both parties, and there have been divers actions of late times brought for this cauſe, and they have been adjudged good, and the engagement to marry is not meerly a a ſpiritual matter, and this Action is not to compell the mariage upon the Contract, but to recover damages for not doing it, and it is like to a wager, and here is a temporal loſs, and therefore a temporal Action doth lie. But it was adjourned till next Term to be argued again, and then judgement was given for the Plaintif, for the Court held, that the diſ-engagement ſhall be intended to the party himſelf, and here is no need to expreſſe notice given of it. Poſtea.

Arreſt of Iudgement in an action upon the Caſe upon an Aſſumpſit.

Promiſe. Caſe.

Kenedy againſt Fiſher.

Mich. 1651. Banc. ſup.

KEnedy declared in an Action upon the caſe againſt Fiſher for ſpeaking theſe words of him, he loſt his Feet by the Pox, innuendo the French Pox: The Defendant demurred to the Declaration, and after imparled, and then pleaded a plea of priviledge. Hales deſired the opinion of the Court, whether this plea were now allowable, becauſe the Books differed about it. Roll chief Iuſtice anſwered, that the plea is not allowable, becauſe there is but a priviledge claimed by it, and the Plea goes not to the juriſdiction of the

Whether a Plea of priviledge was to be allowed.

the Court, Therefore let the Defendant plead in chief.

Starkey againſt Mill.

Mich. 1651. Banc. ſup.

Entred Trin. 1651. rot. 170.

Arreſt of Iudgement in an Action upon an Aſſumpſit.

STarkey brought an Action upon the Caſe againſt Mill upon two ſeveral Aſſumpſits, and obtains a Verdict upon both, and entire damages are given: It was moved in Arreſt of Judgement, that one of the promiſes was not good, becauſe there was no conſideration to ground it upon; and ſo the damages being intire upon both the Aſſumpſits, & one failing, judgment cannot be given. The caſe was this, The Father gave goods to his Son, in conſideration that the Son ſhould pay the Plaintif in this action 20 l. It was urged that this can be no conſideration for the Plaintif to bring his action, becauſe here is no debt due to him, but only an appointment for the Son to pay money to him, in conſideration of the goods given him by his Father. But Hales on the other ſide ſaid, that if there may be a debt by any intendment due to the Plaintif, then the Aſſumpſit is good, and here is a debt due to him, therefore the Aſſumpſit is good. Roll chief Iuſtice held, that it is good as it is, for there is a plain Contract, becauſe the goods were given for the benefit of the Plaintif, though the Contract be not between him and the Defendant, and he may well have an Action upon the Caſe, for here is a promiſe in Law made to the Plaintif, though there be not a promiſe in fact, & there is a debt here; and the Aſſumpſit is good. Ierman and Ask Iuſtices agreed, but Nicholas doubted. But Iudgement was given for the Plaintif.

Conſideration.

Caſe.

Creſsit againſt Burgis.

Mich. 1651. Banc. ſup.

Arreſt of Iudgement in Debt upon the Statute of 2 Ed. 6. for tithes.

AN Action of Debt was brought upon the Statute of 2 Ed. 6. for tithes, upon nil debet pleaded, and a verdict and damages given for the Plaintif, it was moved in Arreſt of Judgement that the damages given are for tithes growing upon 71 Acres of land, whereas the Plaintif in his Declaration declares but for tithes growing upon 70 Acres of Land, ſo that the damages are given for more than is declared for, and contrary to the demand. To this it was anſwered, that this is but the miſ-counting of the Jury, and is not material, becauſe by the whole Declaration it appears there was but 70 Acres, and this is but a deſcription by the Jury how the ſeveral parcels of land were ſown, viz. with what Corn. Roll chief Iuſtice ſaid, The Declaration is that the Defendant was ſeiſed of 70 Acres of Arable land, and that ſo many Acres were ſowed with Wheat, ſo many with Oats, ſo many with Peaſe, ſo many with Beans; and as to the 5 Acres reſidue ſowed with Barley, which all amounts to 71 Acres; and it ought to have been as to 4 Acres reſidue, ſo that this is but a miſ-counting of the Jury, for the Jury cannot be deceived, for the land is called but 70 Acres in the Declaration, and no damage ariſeth to any by this miſtake. To which the reſt of the Judges agreed, and judgement was given for the Plaintif, niſi.

Damages.

Mi-

Mich. 1651 Banc. sup.

THe Court was moved to reverse an Outlawry for want of Proclamation; the question was whether it may be done by Attorney, the party himself, by reason of infirmity of body, being not able to come in person: Upon view of the Statute, Roll chief Iustice said, he must come in person, otherwise it cannot be done; yet the Court would advise. Afterwards it was over-ruled, that it could not be reversed except he come in person. Motion to reverse an Outlawry. Apparence.

Drinkwater against Pack.

Mich. 1651 Banc. sup.

DRinkwater brought an action upon an Escape against Pack one of the Sherifs of London, and obtains a Verdict against him. It was moved in Arrest of Judgement, that the Plaintif declares that the party was in the custody of both the Sherifs, and yet the Action is brought against but one of them, the prisoner that escaped being in Ludgate, in the custody of the Defendant Pack. Latch answered, that the Exception is not good, because in Law the prisoner that escaped is in the custody of both the Sherifs. Hales on the other side said, that it doth not appear upon the Record, that he was in the Custocustody of both the Sherifs, and it shall not be supplyed by a forein intendment, and the party shall be intended to be in custody, according to the Custom of London, and not by the Common Law. Roll chief Iustice held the Declaration good, for the prisoner was in custody of both the Sherifs, although he was in the Custody of Pack, and it stands well enough with the Record, and the words ut præfertur do not hurt the averment, and the words existent. in custodia is a good averment, that he was in custody, as in an Indictment, Tunc existens tenementum is good; and it is also here found by the Jury that he was in custody; for how else could they find for the Plaintif. Ierman ad idem: But because the two other Judges had no Books delivered them, they would deliver no opinion then. Afterward Iudgement was given for the Plaintif. Arrest of Iudgement in an Action for an escape. Declaration. Averment.

Cottrell and his VVife against Theoballs.

Mich. 1651 Banc. sup.

COttrell and his Wife brought an Action upon the Case upon an Assumpsit against Theoballs, and declared that the Defendant, in consideration that the Plaintif would marry A. that is now the Plaintifs wife, did assume and promise to the Plaintif to make good a Legacy given unto her by her Fathers Will, and would also give unto her 40 l. more out of his own part given unto him by the said Will, at her age of 18 years, and declares further, that thereupon he did marry her, and that the Defendant had not performed his promise, and so concludes, to his damage so much. Upon non assumpsit pleaded, and a Verdict for the Plaintif, the Defendant moved in Arrest of judgement, and took divers Exceptions, but the Court insisted but upon one of them, and that was held material, and it was this, That the Wife did here joyn in the Action with her Husband, which she ought not to do, because the promise was made to the Husband only, and for his benefit, and the sole consideration for the promise doth Arrest of judgement in an Action upon an Assumpsit. Action.

arise from the Husband, namely his marying the Feme; And Basield and Collins his case, 22 Car. and Cheesman and Wats case 23 Car. were cited, and Roll chief Iustice put this case. A promise was made by one to a Feme Covert, that if she will procure her Husband to levy a fine of such lands, that he would give her a rioing suit; And it was adjudged that the Baron and Feme cannot joyn in an action for breach of this promise; and he said that in the case at Bar it was a meer covenant, and no duty grew thereby to the Feme. Postea.

Case.

Goodyer against Shaw.

Mich. 1651. Banc. sup.

Mich 1650. rot. 633.

Demurrer to a plea in an Action of Trespas.

GOodyer brought an Action of Trespas for an Assault and Battery, and wounding of his Servant, and taking away 12 plate locks, against Shaw. The Defendant Shaw pleaded not culpable to the Assault and Battery, and wounding, and as to the taking away of the locks he pleaded a special plea of justification, by vertue of Letters Patents of incorporation granted to the Lock-smiths of Durham by Cutbert Bishop of Durham, who had jura regalia within the County Palatine of Durham, and that by vertue of this Charter the locks being not good, he as Warden of the Company did take them. To this Plea the Plaintif demurred, and for cause it was shewed, that it appears not by the Plea that the Black-smiths are a Corporation created by the Bishop, but only that the Customs used amongst them in Order to the regulating of their Trade were confirmed by the Bishop, which doth not make them a Corporation, Plow. f. 199. Long quint. f. 40, 41. 2ly. It doth not appear by the Charter that they have any authority to take away ill made locks; and therefore judgement was prayed for the Plaintif. Roll chief Iustice said, That here doth not appear any Order made by the Corporation to take away the Locks, and therefore it was done without warrant, though the Corporation had such a power; But besides it will be very hard to maintain the Lock-smiths to be a Corporation, because the Bishop confirmed their Orders. Therefore let the Plaintif have his judgement, nisi.

Corporation.

Bishop against Fitzherbert.

Mich. 1651. Banc. sup.

Arrest of Iudgement in an action for words.

BIshop brought an Action upon the Case against Fitzherbert, for speaking these words of him, thou art a Theef, and hast stollen Horses: Upon not guilty pleaded, and a verdict found for the Plaintif, It was moved in Arrest of Judgement, that as the words are laid in the Declaration they are not Actionable, for it is incertain of whom they were spoken: The Declaration was thus, That the Defendant Colloquium habens cum querente in the presence of others, dixit, meaning the Plaintif, Thou art a Theef, and hast stollen Horses. The Court at the first moving of this Case enclined the words were actionable, because it shall be intended they were spoken of the Plaintif, though it be not directly said so; And afterward it being moved again, the Court held the words well enough laid to bear an Action, because upon the whole Record the words plainly appear to be spoken of the Plaintif, and therefore Iudgement was given for him.

Free-

Freeman against Childereſs.

Mich. 1651. Banc. ſup.

Entred Trin. 1651. rot. 45.

FReeman brought an Action upon the Caſe againſt Childereſs for ſpeaking theſe words of her, She is a Whore, and I will prove her a Whore, and an arrant Whore. Upon not guilty pleaded, and a Verdict found for the Plaintif, it was moved in Arreſt of Judgement that the words are not actionable, becauſe they are but words of choler, and ſpoken in paſsion, the judgement at the firſt moving of it was ſtayed, yet it was then doubted whether the words did not import more in them than to ſay barely of a woman, ſhe is a whore: But afterwards it being again moved, Roll chief Juſtice ſaid, that the words were too generally ſpoken to be actionable, and that they are but words of paſsion, and that before the Act made againſt Adultery, prohibitions have been granted to the Prerogative Court for libelling againſt perſons, for calling of women whores, and therefore Nil capiat per Billam, miſi. Arreſt of Judgement in an Action for words. Prohibitions.

Preſton againſt Mortlock.

Mich. 1651. Banc. ſup.

AN Action of Treſpaſs was brought againſt 4 Defendants, and before a Verdict one of them dyed, and the Verdict was found againſt the Defendant: Twiſden prayed the Plaintif might have judgement againſt the other three. Roll chief Juſtice anſwered, If you will relinquiſh your damages as to the perſon that is dead, you may have judgement againſt the reſt. Judgement.

Davis againſt the Lord Foliot.

Mich. 1651. Banc. ſup.

THe Court was moved to grant the good behaviour againſt the L. Foliot, becauſe he was endicted for a foul Battery at the Seſsions in London and the Bill was found againſt him. But Roll chief Juſtice anſwered. It cannot be granted upon a motion; but you muſt prefer Articles againſt him here upon Oath, and then you may move for it, and if there appear cauſe in the Articles it ſhall be granted. Motion for the good behaviour. Good behaviour.

Mich. 1651. Banc. ſup.

THe Court was moved for a writ to ſwear one in the Office of a Major, to which he was elected for the Borough of Trevenny in Cornewall, becauſe the old Major did not ſwear him in due time as he ought to do, but did adjourn the Court before it was done. Roll chief Juſtice anſwered, that there is no preſident to ſwear ſuch an Officer, yet ordered, that notice ſhould be given to the Town, and preſidents to be brought into Court, if any were to warrant it. For a Writ to ſwear one in the Office of a Major of a Town.

Whitway against Pinsent.

Mich. 1651. Banc. sup.

Pasc. 1651. rot. 61.

Demurrer to a plea in Covenant.

A man made a lease of lands for years by deed, and covenanted that the Lessee & his Assigns should enjoy them during the Term, the Lessor made the Defendant his Executor & dyed. The Lessee assigns over his Term, a Stranger enters upon the Assignee, the Assignee takes 40 l. in satisfaction for his being ejected of the Assignor, and afterwards brings an Action of Covenant against the Executor of the Lessor the Defendant. The Defendant pleads the acceptance of the 40 l. of the Assignor in satisfaction of the wrong done him in Bar of the Action, and to this plea the Plaintiff demurred. The question here was, whether the Action of Covenant did lye against the Defendant, since that the Plaintiff had received 40 l. of his Assignor in satisfaction. Roll chief Justice said, that here is a double Covenant, one of the Lessor, and the other of the Assignor, and therefore the party may have two Actions, and therefore he is not here barred, to bring this second Action, though he have barred himself by the acceptance of the 40 l. from bringing an Action against his Assignor, and the Defendant hath not pleaded that the 40 l. was given in satisfaction of both the Covenants, for then it had been otherwayes. Jerman Justice to the same effect, That they are several Covenants, by several deeds, and both the parties are severally bound, and satisfaction given by one of them, is not the satisfaction of the other. And he said if Lessee for years assign over his Term the Lessor having notice thereof, and he accept the rent from the assignee, he cannot demand the rent of the Lessee afterwards, yet he may sue other Covenants conteined in the lease against him, as for reparations or the like. The rule was for the Plaintiff to take his Judgement, nisi.

Bar.

Action.

Mich. 1651. Banc. sup.

For a certiorari to remove an endictment.

Serjeant Glyn moved for a certiorari to remove an endictment of forcible entry that was once before removed hither, and after sent down by a procedendo, because the Justices below will not grant restitution. Roll chief Justice answered, There is a plea put in, and in such case it is not usual to grant a certiorari, yet it may be that it may be granted, therefore let the other side shew cause on Monday next why it should not be granted.

Cantrell against Stephens.

Mich. 1651. Banc. sup.

Arrest of judgement for an Action upon the case for stopping a way.

Cantrell brought an Action upon the case against Stephens for stopping his way in a Meadow called Madbrook in the parish of Redriff in Kent; upon not guilty pleaded, and a verdict found for the Plaintiff, It was moved in arrest of Judgement that the Plaintiff as Lessee, to the Haberdashers company of London, claimed to have a way for them, whereas they having let the land cannot have the way, but the Lessee in possession. 2ly. The

The preſcription is not rightly applyed, for it ought to be for them to have a way pro tenentibus et occupatoribus ſuis, which is not ſo here. Twiſden anſwered it ſhall be intended Tenants, and Occuppers to the Haberdaſhers, though it be not ſaid ſuis. Latch ſaid that a preſcription per que eſtate is good in an Action upon the Caſe, becauſe no land is claimed, and Green on the ſame ſide ſaid, the exception taken was helped by the verdict. Wild on the other ſide ſaid, that it doth not appear that the Tenant who brings the Action, comes in by the Haberdaſhers who claim the way, and ſo he cannot preſcribe to have it, and the preſcription ought to be laid pro tenentibus & ſubtenentibus, which Roll chief Iuſtice denyed, and ſaid that it is laid that the Haberdaſhers were ſeiſed in Fée, & poſtea huc uſq;, and ſo they have the Fée at the time, and may preſcribe; but it had been better for the party to have ſhewed that he was their Tenant: but it being after a verdict, the queſtion is whether it be not helped. Upon reading the Record, Roll chief Iuſtice obſerved, that it appeared not whoſe Occuppyer and Tenant the Plaintiff is; but only by way of argument; but ſaid the queſtion is whether the verdict do help it, and he inclyned it did not, becauſe the Action is brought by the Tenant, who hath not entitled himſelf to the Action, for he hath made only a title to the way in the Haberdaſhers; but hath derived no Eſtate from them to himſelf. At another day Roll chief Iuſtice ſaid, we muſt not take things by intendment, and here is a failer in the very giſt of the Action, for the Plaintiff hath not entitled himſelf to the Action, for he hath no intereſt, for it appears not how he is Occupyer of the land, for he doth not ſay he is Occupator ſuus, and as he hath laid the Declaration, the Company ought to have brought the Action. Ierman Iuſtice to the ſame effect, and ſaid that upon a demurrer it had been cleerly naught. and the verdict here doth not help it, for no title appears for the Plaintiff, and the verdict cannot give him that he had not before. Nicholas and Ask Iuſtices to the ſame effect. Roll, If it had been Occupator ſuus, I doubt it would not make the Declaration good, becauſe it ſhews not by what title So The rule was nil capiat per billam, niſi.

Preſcription.

Verdict.

Title.

Tayler againſt Web.

Mich. 1651. Banc. ſup.

Hill. 1650. rot. 240.

IN an ejectione firmæ upon a leaſe for 7 years there was a ſpecial verdict found, and the queſtions in the Caſe grew upon the words of a Will that were falſe orthography, viz. I do make my Coſen Giles Bridges my Iolle Ayeare and my Yexecutor, meaning my ſole Heir, and Executor. Powis of Counſel with the Plaintiff held, that the Will was good to make Giles Briges the Teſtators Heir and Executor, notwithſtanding the miſwriting of the words, and that by the Will the Land and perſonal Eſtate paſſed unto him, for he ſaid, if by my Will I make one my Heir, This is a deviſe to him of all my Lands in Fee, for the Deviſee is put in loco hæredis. and ſhall be like an Heir by deſcent, for he is hæres factus, although he be not hæres natus, Mich. 31 & 32 Eliz. rot. 235 Godfreys Reports, Hob. rep. f. 34. b. Coundens caſe, Hob. new edition 75. Spark againſt Burrell, the very caſe in point adjudged. 7 E. 6. Br. Done 44. and Deviſe 48. and in this Caſe the Deviſee had annuities to pay, and monies for Legacies, which ſhews the intent of the Teſtator to be, that he ſhall have his Lands and Goods, neither ſhall the miſſpelling of the word Heir hurt the Will, for

Special verdict in an ejectione firmæ.

the intent of the Testator shall be followed, if it may be known, as it may well be here, Hob. f. 32. 15 H. 7. f. 12. Cooks Lit. f. 323. Dyer 325. 2ly. Misnaming in a Will shall not hurt the Will, Dyer 323. 21 Rich. 2. Fitzh. devise 27. 10. rep. 57. 3ly. False Latin shall not destroy deeds nor pleadings, though it will abate writs, a fortiori false English shall not destroy a Will, 9 H. 7. 16. 10. rep. Osborns case. Hob. 227. 10. rep. 133. a. 9 H. 6. 7. a. and here is only vitium scriptoris, and that cannot destroy a Will, Hob. f. 16. Walkers case, f. 104, & 104. 9. rep. 48. a. Dyer. 17 Eliz. f. 342. Digbyes case. Another reason is, the word Heir is here written according to the pronunciation, and sound of the word, though it agree not in letters, and H. that is left out is no letter, but an asperate note, and the language in England as it differs in time, so it differs in place. for men speak not, nor write, English in all parts of England alike, and a Will in latin or greek is a good Will within the Statute, so that it is not necessary for a Will to be good English, and the Testator was bred in France, and could neither write nor speak good English, and his Will so much the rather is to be favoured. And false English hath been allowed in a Bond, viz. senteen for seventeen pounds, 9. rep. 48. a. much more may it be in a Will, and so he prayed Judgement for the Plaintiff. Latch for the Defendant argued that the Will was not good, he considered 2. points. 1. When a man makes one his sole Ayeare and Executor what construction the words shall have. 2ly. What Estate is conveyed by them. And first he said that Roberts Case cited by Powis was not to the purpose. 1. Because it is not the principal case. And 2ly. It is but an opinion there, and an Heir may be without land. And for Counden and Clarks case that was cited, as it was urged, it is for me, and not against me, and there can be no authority cited, that if one make a man his Heir, that his lands are thereby conveyed to him in Fee simple. But in our case there can be no certain intent of the Testator found out, and the making of one his Heir in France where the Testator was bred, according to the Civil Law there used, is but to make him his Executor, and so the Testator might mean it. And if one in his Will say, I make one of my Daughters my Heir, and do not say of his Lands, this shall not disinherit the other Daughters, and if there should be any Estate conveyed here, it cannot be but an Estate for life. Brook Done 44. 8 Jac. C. B. Inkersalls case. 3ly. The ill orthography here makes the Will naught, for a Will cannot be made good by conjectures, Hob. 34. Mich. 23 Car. Robinsons case, the Judgement was reversed for writing the word Aeris instead of æris with a dipthongue. Trin. 17 Car. C. B. rot. 74. and in Skirret and Skinners case libis with a dash over put for libris was adjudged ill, and in our case here are divers words miswritten. And for the variation of our English dialect which is objected it is to no purpose, because this will was lately made & the dialect alters not in so short a time, and the dialect of the County where the Will was made, viz. Glocester Shire agrees not with the Will. And Hill. 6. Car. this Will came in dispute in the Court of Wards, and a decree there passed against the Will in this point. Will. The Court said, the case is doubtful, because the Will doth not say, I make him heir of my Land, but generally my heir and Executor, but the false writing hurts not a Will, if the Testators mind may be found out. Adjourned to be argued again. 307.

Wood

Wood against Topham.

Mich. 1651 Banc. sup.

WOod brought an Action of Trespasse upon the case quare filium & hæredem rapuit et maritavit, against Topham, upon not guilty pleaded, and a verdict found for the Plaintiff, the Defendant moved in arrest of Judgement, and takes these exceptions to the Declaration, 1. That the Plaintiff doth not say cujus maritagium ad ipsum pertinet. 2ly. That he doth not say that the Heir was within age; and Maynard of Counsel with the Defendant said that the exceptions are not to the writ, but to the Declaration, and the Action being a Trespasse to recover the Damages, the Plaintiff ought to entitle himself to the mariage for the losse whereof he would recover damages, for the Heir it may be is not Heir apparent to him, and then is no mariage due to him, and here is a special Declaration, for the losse of the mariage. Roll chief Iustice answered, the writs are good both wayes, and so may the Declaration be either with those words, or without them, and he makes not the ground of his Action, to be that the mariage belonged to him; but of Common right it doth belong to him, and the words are used to be alleged, only to increase the Damages, and the ground of the Declaration is only quare filium suum & hæredem rapuit, and for this the Plaintiff ought to have his Judgement. Ierman Iustice differed, and said, the Plaintiff doth not shew he had any damage by the mariage, & it may be that he had been maryed before, or was of full age & so no cause of Action. Nicholas Iustice as Roll, and said that by the Law the mariage belongs to the Father, and it may prove a dishonour to the family to have his son taken away, and maryed without the Fathers consent. Ask Iustice to the same effect, and so Iudgement was given for the Plaintiff, nisi. Antea.

A rest of judgement in an Action on the case.

Writs.

Declaration.

Common right.

Mich. 1651. Banc. sup.

THe Court was moved to mitigate fines, that were to be set upon rioters that were found guilty upon an information exhibited against them, for the riotous cutting down of wood. But Wild on the other side prayed there might be good fines set upon them according to the fact found upon the Record, because it was a foul riot. The Court answered, they are found guilty of the riot, and therefore the fine cannot be lesse than ten pounds at the least for the principal, there being a verdict in the case, and so let it be, and 4. marks a piece for the rest. For we must preserve the peace of the County.

Motion to mitigate fines for riots.

Fine.

Baker against Smith.

Mich. 1651. Banc. sup.

THe case of Baker and Smith formerly spoken to was again moved, and Maynard answered the exceptions offered in arrest of Judgement. 1. It was objected that here was not a mutual promise set forth between the partyes, for there is no agreement made by the Feme, for it is only said, that she consented to marry the party, which is not a binding agreement. To this he answered, here was a mutual, and binding agreement, though it be-

In answer to a matter spoken in arrest of judgement.

be not so plainly expressed in words as it might have been, 3 H. 6. 36, 37. A verbal promise may be discharged by words, and so it is here, London and Stokes case, Trin. 10 Car. rot. 236. Next it is not necessary here to give notice of the discharge of the promise, though if there be notice it is well enough, because the thing to be done upon it, to wit the payment of the 1000 l. is certain, and the discharge shall be intended to be in the presence of the party to whom it is given; for the Declaration is exoneravit ipsum, which shall not be intended in his absence. Pasch. 10 Car. Harvy and Inglethorps case, and Mich. 8 Iac. Martin and Wilbie, Hodges and More, Pasch. 1 Car. Banc. Reg. 7 Iac. Bradlyes case, 14 Iac. Beedly and Goodrose. Latch on the other side argued, that here is no binding promise on the behalf of the woman to marry with the Defendant, and so the discharge of it can be no consideration; for this is not a reciprocal, but a bare acceptation of the promise made by the other; and an action of the case lay not against her if she had refused to marry with the Defendant, because here is no re-promission made by her. 2ly. It appears not that the discharge was in convenient time, for it was 2 years after; but admitting that to be so, yet here is no notice of the discharge, and that is necessary to be given, and it shall not be intended to be given without shewing it, for the Declaration ought to be certain, and here is no inducement in it that there was any notice given in his presence, and if it were given in his absence, he ought to have notice given him of his discharge, else how should he know it? and it were unreasonable to charge him if he had no notice, and by a third person he cannot receive notice, as it is in the Cases put by Mr. Maynard on the other side. In the Case of Peck and Ingram in this Court adjudged that the party ought to have notice when the Feme left her Fathers House and came to such a place. Roll chief Justice said, here are two promises, 1. The Feme assumed, that if the Defendant would marry her, she would consent to him; and here is a consideration, although there be not an absolute mutual promise, for it is a promise in law, and the Action may be laid by way of consideration, or by way of mutual Contract. 2ly. Here is but a promise de futuro, and there may be a temporal loss, although the thing to be done, viz. the marriage, be spiritual; And the disengagement of the party doth not imply notice; yet the demand of the 1000 l. now implies a discharge, nor can the party here take notice of a third person, and therefore it is necessary to give him notice; for where the party cannot take notice from any but the party himself, there notice must be given him. Jerman Justice held, here was a good mutual promise to raise a consideration, and by the words exoneravit ipsum, it shall be intended to be to the person himself, & this implyes a notice, especially it being after a verdict. Nicholas Just. much to the effect as Roll chief Just. but he doubted whether the words do imply a personal notice, for it may be it was in his absence, and the verdict will not help it, and so there can be no judgement. Ask Justice said, here was a good promise, but the words exoneravit ipsum do not imply a notice, so the Court was divided, and would advise.

Consideration Promise in Law. Mutual Contract. Implication.

Notice.

Hume against Hinton.

Mich. 1651. Banc. sup.

Arrest of judgement in an Action upon the case upon a promise.

HUme brought an Action upon the Case against Hinton, and declared, That whereas the Son of the Defendant did in his life-time owe unto the Plaintif 8 l. and dyed intestate, the Plaintif did demand the said 8 l. of the Defendant, being Mother to the intestate; whereupon she being satisfied of the justness of the debt, did assume and promise unto the Plaintif, that

that if he would stay for the money till Mich. next, that then she would pay it. Upon non Assumpsit pleaded, and a verdict found for the Plaintif, the Defendant moved in Arrest of Judgement, that here was no consideration to ground the Assumpsit upon, because it was not the debt of the party that assumed to pay it, neither was the Executor or administrator nor consequently lyable any way by law to pay it, and therefore an Assumpsit to pay a remediless debt, if the Plaintif would stay for it, is no good Assumpsit, as in 6 Car. in this Court, in Morgans Case. An Assumpsit to pay the rent of the land behind, if the party would forbear to distrein Corn in the shocks, was adjudged no good Assumpsit, because such Corn is not distreinable, and it appears not here what person the Son was, or where he lived, or that he either had or left any goods, and the meer ground of the Action is the piety of the Mother, and no other matter. And here appears no person liable to pay this debt, neither plainly, nor by intendment, and the Ordinary is not chargeable if no goods come to his hands. And 2ly. There is now no Ordinary, for it is taken away by the Parliament, and 9 rep. Bains case is not like to this case, neither is Iones and Smiths case, Trin. 8 Iac. rot. 192. like to this case, for there was a person liable to be sued, but it is not so here, so that this is a stronger case. But if there should be a good consideration, yet the averment of the performance of it is not good, for it is not certain how he stayed. Wild for the Plaintif held, that here is a good consideration, because the Plaintif is hereby tyed not to sue any person whatsoever for the debt till Michaelmas, and so it is a prejudice to him to forbear: And it shall be intended here that the Intestate did leave sufficient goods to satisfie the debt; and though there be no Ordinary, yet the party that takes the goods may be sued, and the Case of Homes and Smith cited is for the Plaintif in my Report, and the judgement is not there entred in the Roll, but in the Pargent only, it is entred pro Defendente, and the case of Hill and Baily is since that, and that is with me, and is to be preferred before the other, because it is a later judgement. 2ly. The averment is good in substance, although it be not so express in words as it might have been, and it is now after a Verdict. The Court for the first point held, here was a good consideration, for it is that the Plaintif shall forbear to sue for the money generally, which goes to all the world, and it is not only to forbear to sue a particular person, but to forbear to sue for the money; and this forbearance may be a prejudice to the party, and a loss in not suing till that time. But for the latter exception Roll chief Justice said, if the breach be not well assigned the verdict will not help it; and you say that you stayed in expectation of the money, and do not say absolutely that you stayed. Therefore let us see a book, and speak to the last point again on Saturday next. In this case Roll chief Justice said, where there is no body else to be sued for a Debt, the Ordinary is to be sued, although he is not to be charged, if he have no goods, and in London it is usual to do it; and now Sir Nathaniel Brent is in place of the Ordinary throughout all England. Afterward judgement was given for the Plaintif, because the consideration and the averment were held both good.

Consideration.

Breach.

Ordinary.

Debt.

Mich. 1651. Banc. sup.

One Harding was endicted 21 Car. for an Assault and Battery made in Westminster hall, and the party found guilty: the Court was moved for a rule to enter judgement against him, because it was so long since the Verdict. But the Court said, if you may do it by the rules of the Court enter it, for we will make no rule without hearing the other side, therefore give notice, & then move it again.

For a rule to enter judgement.

Mich. 1651. Banc. sup.

Demurrer to a Declaration in Debt upon an Obligation to perform Covenants. Discontinuance.

AN Action of Debt was brought upon an Obligation of 2000 l. for performance of the Covenants of an Indenture. The Defendant demurs to the Declaration, and the Plaintif joyns in the Demurrer; and after reading of the Record, and the Exceptions opened, Twisden moved the Court for the Plaintif, that he might discontinue his action, because there was a fault in the laying it. Roll chief Justice said, Let it stay as it is this Term, for this is in our discretion, and it is but a slip in pleading, and in the mean time we will advise.

Barnard against King.

Mich. 1651 Banc. sup.

Pasch. 1651. rot. 467.

Demurrer to a replication in Debt upon an Obligation to stand to an Award.

BArnard brought an Action of Debt upon an Obligation of 500 l. to stand to an Award. The Defendant pleaded nullum arbitrium. The Plaintif replies that the Umpire made the award, and sets it forth, and assigns a breach: To this Replication the Defendant demurred, and takes exception, that the Plaintif sets forth that the Arbitrators could not agree, and after they had denied to make the Award, the same day the Umpire made the Award. Latch of Counsel with the Defendant held this Award set forth in the Replication to be naught, because the submission was, that if the Arbitrators shall not make the Award to morrow, then the Umpire shall make the Umpirage; and here the Umpirage is made upon the same day that was given to the Arbitators to make the Award, and they have the whole day by the submission to make it in, and although they cannot agree to make it one part of the day, they may agree afterwards the same day to make it, and this disagreement is not a giving up of their authority, and Wood and Clements case, 24 Car. is not against this. 2ly. It is not said that the arbitrement was delivered. 3ly. The matter awarded is not within the submission, namely the payment of the rent expressed. Hales on the other side argued, that the Umpire might make the Award upon that day that is set forth; and the Condition here is all one, as if it had been said, if the Arbitrators make the Award to morrow, or if the Umpire make the Award to morrow. Pasch. 14 Jac. Barry and Fells case. And the words here Postquam denegassent, et deseruissent. is a direct averment that the Arbitrators could not agree to make the Award; and Arbitrators may make an award after they have chosen an Umpire; and although the Umpire had power to make the Umpirage a day after they made it; yet if it be made before it is a good Umpirage, if the Law permit it, and the Umpirage here is well delivered, for the submission is not that it shall be delivered to both parties, but generally that it shall be delivered, and therefore it is well if it be delivered to one, it being ready to be delivered to the other: And for the payment of the rent, although it be a future Act, yet being matter of satisfaction, it is good, although it be not expressed in the submission. Roll chief Justice said, for the last matter the words super præmissis brings the payment of the rent within the submission, otherwise the awarding of the payment thereof would not be good by way of satisfaction: But here the Controversie is for the land for which the

Subtil.

rent

rent is to be paid, and the matter doth not appear to be out of the submission, and it is not necessary to aver that the land was in Controversie. 2ly. For the delivery of the Award it is well enough as it is, for it is not specified to whom the Umpire shall deliver the Umpirage, although it be expressed to whom the Arbitrators were to deliver their Award, if they had made it. But the main question here is, if the Umpire could make the Umpirage the day it was made; and for that I hold he could not, because the authority given by the submission to the Arbitrators was not determined when the Umpirage was made; and by the submission the Arbitrators have no authority to make an Umpire, for then it had been good, and it appears not that the Umpire had concurrent authority with the Arbitrators; for it is not said if the Arbitrators make no arbitrement then the Umpire shall make it; but here is a Condition for the Arbitrators to have all the day precedent to make the arbitration in, and no concurring power is given to the Umpire that day, for the Arbitrators have all of it to agree in, and till it is ended the Umpire hath no power at all, otherwise the submission would be repugnant in it self. The rest of the Judges concurred in all, and so ruled, That the Plaintif nil capiat per billam, nisi.

Averment.

Umpirage.

Award.

Theoballs against Newton.

Mich. 1651. Banc. sup.

One was sued upon the Statute of Inmates, and the distringas jurata bare date on a Sunday, and out of Term, and so is erroneous, The question here was, whether it be not helped by the Statutes of Jeofails, of 18 Eliz. and 21 Iac. Roll chief Justice held, that the Statutes extend not to penal Laws, although it be ambiguously penned, nor to any processes grounded upon them, for the Proviso exempts the Original action, and by consequence all processes depending upon it are excepted, so that here is no good tryal, but there shall be a venire de novo, nisi.

Jeofails.

Venire de novo.

Tayler and Webb.

Mich. 1651. Banc. sup.

The Case of Tayler and Webb which arose upon a special verdict upon these words of Will, viz. I make my Cosen Giles Bridges my soll ayere and yexecutor, was again moved and argued by Hales, and he made three questions. 1. Whether any estate passeth by the words of the will. 2ly. If any, what estate passeth. 3ly. Whether the false Orthography doth hurt the Will. For the first he said, that by making one his sole heir his land passeth to him. The word heir is to be considered either in relation to an Ancestor, and so one cannot make one his heir, or it may be considered in relation to a thing to be inherited, to wit lands or tenements, and so one may make another his heir, and thus a Custom may make one a mans heir, as it is in Borough English; and an accident may thus also make one a mans heir, as it is in the Case of possessio fratris, Coundens case, Hob. Rep. Case 947. And here it is all one to make one his heir, and to make him heir of his lands; and the reasons are, First, the word heir here cannot have any other relation than to the Testators lands, for he cannot make him his heir otherwise, and the words may be more reasonably intended so. 2ly. The words carry in them the plain intention of the Devisor, that the party should have his lands, although the words are not very proper

Anl. 302

Special Verdict upon the words of a Will.

2 H. 7. A devise of lands to his son after the death of his wife, passed an Estate for life to the wife, although no such Estate was expressed in the Will; so here, although no expresse Estate of land be devised, yet the Devisee shall have the lands by the intent of the Devisor. 3ly. In ordinary speech, if one make such an one his Heir, it is intended that he gives him his lands, 8 Car. in the C. B. in Spurr and Bents case. A devise of his inheritance, was held a devise of his lands, and Trin. 3. Iac. in Terryes case, A devise of all his rents in tayl passed his lands, because in vulgar acceptance it is the rents of lands, and in Pits and Sands case in this Court. A devise of all his free lands in Holford did passe a portion of Tithes, and in the case of one Iohnson, a devise of all his estate passed all his lands. And the words cannot bear the sence to make him Executor, according to the Civill Law, as hath been objected, for the Will shall be intended as it is, to be an English mans Will, and so the word Heir in it shall be interpreted according to our Law, and not the Civill Law, and even in the Civill law to make one his Heir doth convey unto him all his lands, for he is hæres testamentarius, although not hæres legitimus. And in this Will here are two expressions, for the party is made Heir and Executor, which two words cannot signifie one thing, for that would be an idle expression. 4ly. There are some clauses in the Will, which shew the intent of the Testator was to convey his lands, if it were needful to make use of them. 1. There are several annuities for the Devisee to pay. 2ly. He directs him where the conveyances and assurances of his lands were laid up, which plainly shew he meant he should have his land. 3ly. The words Heir and Executor are joyned together, to shew that he gives him all his lands and goods, else one of the words must be imperfect, and ineffectual, which shall not be intended. For Authority 7 E. 6. Br. devise 38. by devising that one Son shall be Heir to the other, it shall be intended of lands, so in construction of law it shall be here intended that the Devisor made him Heir of his lands, Hob. Reports. in Sparkes and Furnells case, William and Anthony shall be each others Heir, and it is not said of land, yet adjudged that it shall be so meant, and so is it in our case, and if I have lands in fee simple, and make one my heir, it shall be intended that he shall have my lands in fee simple, although I say not that I make him Heir of my lands. For the second question, the reasons before expressed do also shew that the lands are passed in Fee, as it is in Purnells and Hambletons case, for the word Heir shall relate to the same Estate, that the party had in the land, who makes the other his Heir, 8. Iac. Inkersals case. For the 3d point, whether here shall be any good devise at all, by reason of the false English, he said it was all one, and to as good effect as if the words were all true English, and neither the incongruity, nor the insufficiency of the words shall hurt the Will, as it is pretended. For 1. This is not in case of pleading or of writs; but in conveyance of lands. It is true that in the former it doth hurt, because writs and pleadings may be amended, if they be naught; but it is fatal in conveyances, for they cannot be amended, as in Trotman and Standards case, Trin. 1651. in this Court it was held that impropriety of words shall not hurt, if they can admit of a good construction. Desinet in piscem mulier formosa superne. 2ly. This is in a Will, which is such an instrument, that is much favoured in Law, and therefore to be favourably construed. 3ly, This is an English Will, and admits of much variety of dialects, and therefore is not to be critically interpreted. Neither are there here any insignificant, or missignificant words, as hath been objected, but significant, for the sound of the word as it is written is the same as if it had been rightly spelled, for Ayer and Heir sound both alike. As in 3 H. 4. f. 4 Baxter and Bixster sounded alike. 2ly. If the word Heir might

might receive any other sence, yet it cannot do so here, because there are other words joyned to it, to declare and signifie that the Testator meant Heir of his Lands, and not the element of Ayre, or a year, as hath been strangely objected, and would prove a ridiculous construction. Osborns case 10. rep. in Thyns case in this Court a demand of dower de capella, although the word were of doubtfull construction in it self, yet by the subject matter, it was held to be made certain enough, so the word Ayeare here shall receive construction according to the subject matter, and the coupling of it also with the word Perecutor, which is also falsely written, shews the Testators intent. For answer to the main objection, viz. that in 6 Car. there was a decree made in the Court of wards, by advise of the Judges, that this was a void and senceless Will, I say that that decree is not of so great waight, as is a Judgement given in a Court of judicature at the common Law, and this was but an opinion delivered in Court, where the Judges were not Judges, and the decree was made as I am enformed, because they believed the Will to be nonsence, the contrary whereof doth appear by my argument. The Court enclyned strongly that the Testator intended to make the Devisee Heir of his lands, and that the words can receive no other construction, for other constructions would be very strange, and forced, and the party that made the Will, is to be considered as one that was inops consilii, and also that wanted a scribe, and his intent seems plain, and shall not be taken according to the Civill law, and if it should, the word Heir will as well extend to the lands as goods. Adjourned to be argued again. 319.

Heir.

Will.

Kymlock against Bamfield.

Mich. 1651. Banc. sup:

Mich. 24. Car. rot. 592.

KYmlock brought an Action upon the case upon an indebitatus assumpsit against Bamfield, for making of apparel. The Defendant pleaded, that he became bound in a Bond of 60 l. to the Plaintiff in satisfaction of the Debt, and that the Plaintiff accepted of it, the Plaintiff replyed that he did not accept of it, to this replication the Defendant demurred, & shews for cause, that the Plaintiff had tendred an issue upon the non acceptance of the Bond, whereas it should have been that the Defendant non devenit tentus. On the other side it was said that it is well enough, & that it is sufficient to say non accepit, and it is not necessary to say he refused the obligation, and though the replication be not good, yet the plea is also naught, and therefore no Judgement can be for the Defendant. The plea is quod devenisset tentus, whereas it ought to be devenit tentus. And 2ly. He shews not in what sum or place, nor that he became bound in satisfaction. Roll chief Iustice said, that by entring into Bond the former contract is gone, if you do not refuse it, and it is not sufficient to say you did not accept of the Bond, for you may yet accept it if you please, and the party cannot plead non est factum, if you bring an Action upon it, until it be absolutely refused, and the contract here is turned into a Bond, and the law determines the contract, and it is not all one with pleading of the acceptance of a horse in satisfaction, or of any other thing as a collateral satisfaction, and the Plaintiff ought to shew that he refused the Obligation, and doth yet refuse it. And here is a negative preignans, for you imply by saying that you accepted not the Obligation in satisfaction, that he gave you the obligation, and you might have said

Demurrer in an action on the case upon an indebitatus assumpsit.

Contract.

Plea.

Negative preignans.

Discontinuance

said, Non devenit tentus, and for the other exceptions they are to no purpose, And therefore Judgement ought to be given against you; but by the favour of the Court we can give you leave to discontinue your Action.

Harding against Freeman.

Mich. 1651. Banc. sup.

Arrest of Judgement in an Action upon the case upon the sale of a Horse.

HArding brought an Action upon the Case against Freeman, and declared against him, that the Defendant did sell unto him a Gelding, and upon the sale did falsely affirm unto him, that the Gelding was his own Gelding, and that he bred him of a Colt, whereas he bred him not of a Colt, neither was it his own Gelding, but another mans Gelding, and so concludes to his damage. Upon not guilty pleaded, and a Verdict found for the Plaintif, the Defendant moved in Arrest of Judgement, 1. That in this sale of the Gelding, the Defendant had made no warranty of him; and therefore though the sale were not good, yet the Action lies not. 2ly. The Plaintif doth not declare that the Defendant knowing the Gelding to be another mans, did affirm him to be his own, and so here doth not appear to be any fraud in the sale. Twisden answered, that the words are sufficient to imply a deceit, though they express not, that he knowing it to be another mans horse did make that affirmation, for the words are that he did it falso et fraudulenter, and affirmed the Horse to be his own. But the Court stayed the Judgement, for they said, that here is no direct affirmation, but only an intendment that scienter fecit, yet afterwards judgement was given for the Plaintif.

Davis against the Lord Foliot.

Mich. 1651. Banc. sup.

For a new writ of Enquiry of damages.

DAvis brought an action of Assault and Battery and wounding against the Lord Foliot, and had a verdict against him, and a writ of enquiry of damages, and upon the writ of Enquiry 200 l. damages were found. The Plaintif moved the Court for a new writ, because by reason of the wilfulness of the Jury the damages were found too small. Twisden on the other side urged, that it could not be, because there was no miscarriage proved in execution of the writ, but it appears to be well executed. Roll chief Justice answered, though we grant not a new writ, yet we can increase the damages upon view of the wound, and here appears to have been a foul Battery by the dagger produced in the Court, and by the party himself that is wounded, and it is not fit that a wilfull Jury should prejudice the party, therefore either consent to a new writ, or else bring your witnesses on both sides and we will hear the motion again. At another day Wild said, the Court cannot increase damages upon a view of the party, if he be not maimed, and here is no maiming, but only a Battery and wounding: But the Court answered that they would advise upon that point, for it seems there is the same reason for encreasing of damages in both cases. At another day Green moved for increase of damages upon the view, and urged 9 H. 4. f. 1. 3 H. 8. 4. 10 H. 4. and Bret and Middleton case in this Court. Twisden on the other side confessed the Books were so, but here the Battery is not apparent, and the wound is internal, and not to be viewed by the Court. Roll chief Justice said, 3 things are considerable, 1. whether the Court can increase the damages, 2ly. Whether

Damages increased by the Court.

ther the wound be apparent? and 3ly Whether the damages given be too small? The Court upon view of the party, and examination of Chirurgions and Witnesses on both sides upon Oath, did conclude that they might increase the damages, and that the wound was apparent, and that the damages were too small, and therefore they increased them to 400 l. and said they would not encrease them more, because they could not inquire into all the circumstances of the fact, as the jury might, but they thought fitting to encrease them in some proportion, because the offence was great, and such outragious Acts are not to be slightly punished.

VVallis against Bucknal.

Hill. 1651. Banc. sup.

VPon a special verdict found in an Ejectione firmæ the case fell out to be this: A Copyholder of inheritance made a Letter of Attorney to two joyntly and severally to surrender his Copyhold lands in Fee to certain uses, after his death, according to the Custom of the Manor. The question made by Ellis of Counsel with the Plaintif was, whether the Custom was good or not? he argued, that it was not a good Custom. In Sir John Davis Reports it is said, a Custom must be reasonable, and a Custom may be reasonable, when it is but against a particular Law, and not a general Law; but the Custom here thus to convey land, is against a general Law. Particular Customs may be against publique interest, pro bono public. but if they be not, as in our case they are not, they are not good. Next an authority given ought to be Countermandable, and to determine at the death of the party; but this is not so, and therefore it is no good authority, 19 E. 3. f. 5. 2ly. None can give an authority to another to do a thing which he could not do himself; but here it is otherwise, and therefore it is not a good authority. 3ly. By the death of the Copyholder the lands are setled in the heir, and this authority given shall not devest them, and this is not like the surrendring of lands into the hands of the Lord; for a surrender cannot be revoked, but this authority is revokable. Next, the Verdict doth not find that the 2 Attorneys are Customary tenants, but only by way of recital, which is not good; nor doth it appear they were customary tenants, at the time of the admittance; and here is not found any possession or title in the Defendant, and so the Plaintif having primer possession, the Defendant is guilty; neither is it found that the customary Tenant had fee-simple in the land; And if he had but an estate for life he could not make such a letter of Attorney. Also the authority given is not warranted by the Custom set forth. Wilmot of Counsel with the Defendant, said, That this authority here is supported with a special direction, which may survive the party that gives it, 1 H. 7. 8. And an authority may survive the party that gives it; else how can an Executor sell lands by the authority given unto him, 21 E. 4. f. 8. 31 E. 1. Fitzherb. 45. and as for the heir he hath neglected his advantage, if he had any, and cannot now take it: But besides, the authority here given is more than a bare authority, for it is backed with circumstances of time and person; and here is also a Custom to support it, and this Custom is a reasonable Custom, for it is but to enable a man to dispose of his own lands: and there are far more unreasonable Customs than this allowed in our law, as the Custom of Kent, for one of the age of 15 years to be enabled to sell his lands, and this Custom is not against any positive rule of Law, for the custom is, to create the authority to begin after his death, and so it is not to determine by his death; for till then it begins not; and the Custom here is but to alien lands, which is no strange thing; and

Special Verdict in an Ejectione firmæ.

Pro bono publico.

and it is extended but within a ſmall compaſs of land, and ſo cannot be very prejudicial to the publique. And Bambridge and Whaddons caſe 14 Car. in this Court, cited on the other ſide doth differ from this caſe, for there was no Cuſtom to ſupport it. And it doth appear here by the Record, that Dalby the Attorney is a cuſtomary Tenant, and the admiſſion here is found to be ſecundum conſuetudinem Manerii. And one cannot gain a Copphold eſtate by diſſeiſin, and ſo here can be no primer ſeiſin intended, and it is found the Copphold is ſeiſed. Roll chief Juſtice ſaid, It will be hard to maintain the Cuſtom, if it be not found that the party was ſeiſed in fee of the Copphold lands. But 2ly. it is not here found that the land is demiſable, according to the will of the Lord, and ſo it may be free land, & then the cuſtom doth not reach it. Neither is it found that the 2 Attorneys were Copphold Tenants, and the primer poſſeſſion here will make a diſſeiſin by the Defendant, if the Cuſtom be not well found, and then it is for the Plaintif, and I cannot ſee how the Cuſtom can be good, it being againſt the rules of Law; for a man cannot deviſe a Copphold, and here the caſe is worſe, but he may ſurrender to the uſe of his laſt Will and Teſtament. At another day Wilmot to the Exception taken, That it is not found that the two Attorneys were Tenants of the Manor, ſaid; there is ſo much found as ſhall make them be preſumed to be Tenants of the Manor; for it is found that the party is admitted ſecundum conſuetudinem Manerii, which cannot be a good admittance if they were not Tenants. Roll chief Juſtice anſwered, to be admitted ſecundum conſuetudinem, goes to the Admittance, not to the Letter of Attorney: But we will adviſe. At another day Twiſden prayed judgement for the Plaintif, and inſiſted upon the Exception that the two Attorneys were not found cuſtomary Tenants; for one of them is not mentioned at all, and the other is found ſo only by way of recital, and ſo they have not entitled themſelves to the Cuſtom, and then the Defendant hath no title. The Court ruled to ſhew cauſe Saturday following why the Plaintif ſhould not have judgement. Antea.

Cuſtom.

Deviſe.

Cuſtodes againſt Tawny and Norwood.

(Hill. 1651. Banc. ſup.

Endictment for ſpeaking blaſphemous words.

TAwny and Norwood were jointly endicted for blaſphemous words ſeverally ſpoken by them, upon the late Statute made againſt blaſphemy, and were convicted, the parties being removed hither by Habeas Corpus. It was urged that the Endictment was not good, becauſe it was joynt, whereas the words being ſpoken by them ſeverally, they ought to have been endicted ſeverally; for the words ſpoken by one of them cannot be ſaid to be the words of the other. But Roll chief Juſtice ſaid, The Endictment was good enough, though it be joynt, as it is in the caſe of ſeveral perjuries, and ſeveral batteries, where a joynt Endictment doth lie, although it do not for ſeveral felonies, and here the Endictment is upon one and the ſame Statute, and for one and the ſame offence, and therefore the judgement given upon it is alſo good, and it ſhall be taken reddendo ſingula ſingulis (i.) the words to each of them as they ſpoke them.

Floyd

Floyd against Morgan.

Hill. 1651. Banc. sup.

A Writ of Error was brought to reverse a Judgement given in an Action of Trespass, for taking away divers goods, and the Error was that there was the words instrumentum ferri used in the Declaration to express divers things, viz. de quodam instrumento ferri, Anglice a Gridiron, & de quodam instrumento ferri, Anglice a Brandiron, et de quodam instrumento ferri, Anglice a Morter, whereas there are proper Latin words for them, & therefore are not to be so uncertainly described. Darcy against the writ of Error said it was certain enough as they were described, & cited the Reg. f. 45. and said, if it be not certain in the Latin description, yet the Anglice helps it. Roll chief Iustice demanded, what say you to the Case of instrumentum ferri, Anglice a Horse-lock, adjudged naught lately in this place? and there are proper Latin words for the things you describe, which you ought to have used, therefore this description is not good; for where a Latin word signifies many things, there an Anglice is proper to be added to it, otherwise not, and if there be no Latin word to express a thing, one may invent a word, and interpret it with an Anglice, but it is not so here, therefore let the judgement be reversed, nisi, &c. Postea.

Error to reverse a judgement in Trespass for taking away goods Anglice.

Description.

Keightley against Nodes.

Hill. 1651. Banc. sup.

Trin. 1651. rot. 869.

A Writ of Error was brought to reverse a judgement in a Trespass vi et armis at Doncaster, And the Error assigned was, That the Plaintif declared that the Defendant took certain Cows of his out of the Jurisdiction of the Court, and brought them within the jurisdiction, and there disposed of them to his own use, In which case, in regard that the taking of the Cattel, which is the ground of the Action, was without the jurisdiction of the Court, although the disposing of them was within, yet the Court had no jurisdiction of the cause. To which Roll chief Iustice agreed, and said, if the Action had been a Trover and Conversion it had been good, but being a Trespass vi et armis it is naught, and therefore let the Judgement be reversed, nisi.

Error to reverse a judgement in Trespass vi et armis.

Trover.

Cottrell and his VVife against Theoballs.

Hill. 1651. Banc. sup.

This case was again moved, & spoken unto by Turner, who prayd judgment for the Plaintif, because, as he conceived, the Action was well brought by the Husband and Wife, and to prove it he cited these books, 39 H. 6. f. 45. 9 H. 6. f. 4. Nat. Brev. 131. 28 H. 8. Dyer f. 21. Pasch. 5 Car. Brown and Floyds case, Pasc. 13 Car. Oldhams case, and said, That the consideration here did move from both parties, and not from the Husband only. 2ly. It is not necessary to give the Defendant notice that his wife had attained to the age of 18 years, at which time he was to pay the money,

Iudgement prayed in an Action upon a promise.

for he might take notice of it himself. Latch on the other side prayed that the Judgement might be arrested, because the promise was made to the Husband only, that he would make good the Legacy given to his wife by her Father, and give 40 l. more to the Baron and Feme, and the Husband is only to have the benefit of the promise, and the consideration, namely the marriage, moved only from the Husband, and therefore the Action is to be brought by the Husband only, and not by the Husband and his wife, and this promise is not like a promise made to a servant to pay money to the use of his Master, and it is not here said that the promise was made to both, as it might have been, and it is not reasonable to turn over the wifes portion, for which the Husband hath made her a joynture unto the Feme; for if it should have been so, the wife might have released it before the marriage, and the Case cited of Rippon and Norton was otherwise said, 37 Eliz. Banc. Reg. 2lp. Here ought to be notice given when the Feme came to her age of 18 years; for here the Assumpsit is to make good a Legacy, which was to be paid to her at such an age, and he ought to give notice of her age as he ought to an Executor, and this case is not like as where one binds himself in an Obligation to pay another such a sum when he comes to such an age, and the legacy here is to be made good in that manner as the Executor is to pay it. Roll chief Justice said, that the party is not bound to give notice, but the other must take notice at his peril. But the promise is here said to be made to the Husband only, and though the money is to be paid to both, yet it would be inconvenient to intitle the Feme to it, and here it was the folly of the Husband to joyn his wife in the Action, for he might have brought it alone if he would, for he hath alleged that the promise was made to him alone, and therefore the Action is not well brought; and it appears by the Declaration that the Feme was of age before the marriage, and so the notice is out of Doors: The rest of the Judges agreed with Roll chief Justice in all, and so the Court ruled a nil capiat per Billam nisi. Antea.

Notice.

Joyning in Action.

Hill. 1651 Banc. sup.

To quash an Endictment for a private Trespass.

THe Court was moved to quash an Endictment, because it was for a private Trespass, viz. for stopping an antient water-course, and the Endictment doth not conclude ad commune nocumentum, but ad grave damnum, which shews it to be no publique nusance, & so he is not to be endicted. But Roll chief Justice answered, A man may be endicted for a private Trespass, but the party here hath made himself no title to the water-course, and therefore let the Endictment be quashed.

Endictment.

Comport against Beech.

Hill. 1651. Banc. sup.

For a reference touching a Tresp.

THe Court was moved on the Defendants behalf, That he was a very poor man, and in making of a Ditch for another man, he had unwillingly committed a Trespass against the Plaintif, in taking away 2 or 3 wheele-barroughs of Earth of the Plaintifs soil, and therefore it was prayed that the matter might be referred to the Secondary to tax the damages and Costs for the Trespass, which he was ready to pay, & that the proceedings might be stayed. But Roll chief Justice answered, It cannot be, but you may confess the Action.

Reference.

Hele

Hele against Green.

Hill. 1651. Banc. sup.

IN an Ejectione firmæ a special Verdict was found, upon which the Case fell out to be this, A man being Lessee of a Manor for 199 years, devi- Special Verdict in an Ejectione firmæ.
seth the Term to his wife for life, with power to make such estates in as ample manner as he himself might have done, during her life, and the remainder in Tail to his Daughter, and dies, the Feme proves the Will and accepts of the Legacy, and after makes a Lease for 99 years, and dies, and the daughter brings an Ejectione firmæ against the Lessee of the Feme. The question was, whether this Lease made by the Feme were a good Lease or not. Merifield argued, that the Lease was not good after the death of the Feme, because she having but an estate for life, and the Lease for 99 years being derived out of it, when the estate for life ends, the estate derived out of it must end also. And 2ly, If the Feme had any power to dispose of any part of the Term longer than for her life, by the same reason she might have disposed of all of it, which cannot be intended; for the Testator did not mean that she should have power to destroy the Entayl made upon his Daughter. And as to the Objection that she hath disposed of but part of the Term, and therefore hath not destroyed the Entayl: I answer, It matters not what she hath done, but what she might have done, for by the same reason that she disposed of part she might have disposed of the whole; The rest of the Argument I could not hear. Henage Finch on the other side argued, That the Lease made by the Feme continues after her death, because the Feme had a power given her to make such a Lease, and by vertue of that power the Lease continues, for the power given unto her relates to the Estates to be made by her, and not to the continuance of her life. And here the intent of the Testator is to be considered, which was, that his wife should have the power to dispose of all the Term if she would, for he trusted her with it, because she was his Wife, and Mother of his Daughter, to whom the Entayl was made, and the very subject matter shews his intent to be so, and because there is no other power expressed against this in any other part of the Will, and the words that give her this power would be idle and trifling if they should receive any other Construction, 2 Car. Banc. Reg. Danyel and Ogleys case, and Gibs and Whites case, 1 Car. nor does the assent of the Feme to the Legacy, to have the Term for life, destroy her power to make estates. 2ly. She hath well executed this power, for the Jury have found that it is the Lease of the Feme, 9 Iac. Suckham and Hawkins case, a power given to an Executor may be executed by parts. Roll chief Iustice held, the Lease was good; for a Will ought to be so interpreted, that all the parts of it may stand together, and if the Feme here have not power to make this Lease, the Clause of giving her this Lease is idle, and the meaning is so, without doubt the Feme hath the sole estate in Law in her, and the power given here is but a restoring to her of that, which she had before by the Law, and her consenting to the Legacy, doth not take away her power to make Estates. And this limited power, and the remainder to his daughter may stand together, for it might be that the wife would not make such a lease, and then the daughter should have had the land in tayl; but if she dispose of it the daughter shall not have it. Jerman ad Roll, Nicholas Iustice held, that the Feme could only dispose of the land during her life, and that the Testators intent by the words was, that the Feme should not be

Lease.

Lease.

Lease.

typed to occupy the lands her self during her life; but might dispose of them. Ask as Nicholas, that she can dispose of the lands only during her life, for the power is only given during her life, and this interpetation will make all parts of the Will stand together, better than the other interpretation. Adjourned, Antea.

Dekins against Latham.

Hill. 1651. Banc. sup.

Entred Hill. 22 Car. rot. 946.

Special verdict in an ejectione firmæ.

IN an ejectione firmæ a special verdict was found, upon which the Case fell out to be this. One seised of lands covenanted to levy a fine to the use of himself, and his wife for life, and after he leased the lands for 21 years, for 3 l. rent per annum by equal portions, and after the death of J. S. to pay a gross sum of 125 l. by way of fine, payable by 5 l. a year quarterly, with a proviso in the Indenture, that for default of payment of the rent or fine, or for want of reparations, it should be lawfull for the Lessor to re-enter. After the Lessor levyes a fine, and assigneth over his interest in the reversion. The question here was, whether the condition of entry be transferred over to the Assignee, by the transferring over of the reversion. Hales of counsell with the Plaintiff held that the lease proceeds from the Husband only, and not from the Baron and Feme, and the condition is transferred over, for the condition runs joyntly as well to the fine reserved, as to the rent, and is as it were a several condition in Law, although it be comprised but in one clause, and not several clauses, and the condition as to the rent is transferred, though not as to the fine. In 19 E. 4. f. 7. The law makes a several distribution of one præcipe, and so may it do here of one condition, and Rawlins case in the 3d. rep. cited against this comes not to this case, for there the question was of the suspension of a condition; but here it is of the transferring over of a condition. 2ly. If it be but one condition, yet it is well transferred by the Statute of 32 H. 8. C. 14. an extinguishment in part, is not extinguishment of all, although a suspension of part be a suspension of all, and the Grantee of the reversion shall have advantage of the condition, because 1. He is within the words of the condition as to the condition. 2ly. The clause of re-entry is within the words of the Statute; and Knights case objected comes not to this case, for there was a grant but of part of the reversion of the land, which case comes not within the Statute, for the Grantor cannot have advantage by the Statute, where he grants but part of the reversion, and it is not literally without the Statute, and therefore it is within the equity of it, otherwise it would be mischievous to the Grantor, and here is no disadvantage to the Lessee by the transferring of the condition, for the same Statute that gives benefit of the condition, gives benefit of the Covenants, and the Grantee of a reversion shall have benefit of a Covenant to be transferred, although they are entire in words at the beginning, and hath one common conclusion. Wild of Councel on the other side, held the condition to be entire, according to Rawlins case, and goes to payment of the rent, and the fine, and reparations also, and the reversion being assigned with which the rent passeth, the condition is gone also to the fine, Dyer 309. and this is a stronger case than that to destroy the entire condition, by grant of the reversion, 17 El. Brightmans case, C. B. The fine here is a sum collateral, and is not incident to the reversion, and so the condition is collateral, and cannot be apporti-

portioned, 5. rep. Spencers case, 34. 8. Br. Cov. 93. 2ly. The Statute of 32 H. 8. cannot help it, for the purview of the Statute explains the large preamble of the Statute, and shews the intent of the makers of it to be, for forfeitures incident to lands, and reversions, and a covenant is here as general as a condition, and the Statute extends not to a collateral covenant, and therefore not to a condition collateral, 35 H. 6. f. 56. and the cases put on the other side come not to our case. And as for the mischief which may ensue by this it matters not, for it might have been prevented by providence of the partyes, and the inconveniences which may happen to them must not alter the Law. Roll chief Iustice said, if he release the fine, the condition will not stand as to the rest, otherwise if the fine expire by effluxion of time, or if he release the reparations the condition is gone as to the rest, for the condition here is entire, and goes in the destruction of the Estate, and it is the Act of the Lessor himself to assign over the reversion, and by that all is passed away that is incident to it, and by consequence the condition. Ierman Iustice demanded, What if the Lessor shall pay all the fine presently? Roll chief Iustice answered, it may be it will destroy the condition. Nicholas Iustice said, the condition is odious in Law, because it goes in destruction of the Estate. Adjourned to be argued again, because held a case of consequence. At another day the case was moved again, and argued by Latch for the Plaintiff, who made the question to be whether the condition as it is penned may be severed or no, and said, that as it respects the rent, it is not a condition in grosse; but as it respects the fine, it is a condition in grosse, and a condition which is entire in words, may by acts of Law receive distributions. Where the penalty of a condition is intire, there the condition cannot be apportioned; but the condition is not so here, and therefore may be apportioned, Dyer 306 Knights case, 7 H. 7. 6. Perkins. 162. 7. H. 7 Kelm 60. Dyer 334. Popham in Dumports case is contrary to Dyer, Cook. Lit. 203. 2ly. It is questionable whether the Statute may help in our case, and he said it doth, for the name of rent is not altered, nor the condition attending upon it, nor any thing done to alter the execution of the condition. 3ly. By the assignment there is no injury done to the Lessee, for by it here is a freeing of a thing to be done, and the Statute is a favourable Statute, and to be extended with indifferency. Finch on the other side argued much to the same effect as he did formerly. Roll chief Iustice said, it is not necessary for the party to express how the condition relates to all, viz. the re-entry for non payment of the rent, and of the fine, and for not repairing, and he said a man cannot by his own Act divide a condition, for we must keep the rule of law, which is, not to divide a condition, which goes in destruction of an Estate, and this case is not within the Statute of 32 H. 8. All the rest of the Iudges concurred with Roll, and so the rule was iudicium pro defendente, nisi. Condition.

Brown against Nelson.

Hill. 1651. Banc. sup.

Trin. Hill. } 1650 rot. 897.

An Action of Debt upon the Statute 7 Ed. 6. for selling of wine without licence, was brought against 2. Defendants, they both plead nil debet, whereupon issue being joyned, a special verdict was found, viz. that as to one nil debet, and that as to the other he had drawn a pint of wine Whether a nil iudgement given against one of two Defendants were good.

wine without licence, and upon this, Judgement was given against him that was found culpable, It was questioned whether this were a good judgment. But Roll chief Justice concluded it was a good Iudgement, and cited many cases adjudged in point to prove it, and one in particular in an action upon the Statute for dying with Logwood, and he took a difference between an action grounded upon a joynt contract, or a joynt trespasse, and an Action brought joyntly upon a Statute against two, or for a tort done by two, as this is upon the Statute. In the first case Judgement cannot be given against one of the contractors, in the other it may.

Weld against Rumney.

Hill. 1651 Banc. sup.

Hill. 1650. rot. 1193.

Error to reverse a judgment in an action on the case.

A Writ of error was brought to reverse a Judgement given in an Action upon the case against two Executors, and the error assigned was a matter in fact, viz. that one of the Defendants was within age at the time of the Action brought, and did appear, and plead by his Attorney, whereas he ought to have done it by his guardian. Twisden for the Defendant in the writ of Error said, that it is not all one to appear within age in his own right, and in anothers right, for where he appears in his own right, he ought to appear by his guardian; but where he appears in auter droit, as he doth here being an Executor, he may appear by Attorney, and

Appearance.

cited Draytons case 9 Car. But Roll chief Justice denyed the difference, and said, it may be that the Executor may be charged of his proper goods, as in case he have wasted the Testators goods, and then it is not reason but he should plead by his guardian, and he is not within the Statute of 21 Iac. for that Statute was made for the Plaintiff, and this is in case of a Defendant, therefore he should have appeared by his guardian, and therefore let the Iudgement be reversed, nisi.

Fortune against Johnson.

Hill. 1651. Banc. sup.

For an attachment for putting one out of possession.

The Court was moved for an attachment against Iohnson upon an affidavit, that he had ejected one out of possession, that was put in by a habere facias possessionem, and that in a very riotous manner, and had imprisoned the party, so put out of possession, and others. Windham on the other side by way of answer said, that the party came into the land by virtue of an eigne Judgement, and an extent upon it. Roll chief Iustice answered, here is title against title, therefore take your course in law, for we will make no rule in it.

Crosthwayt and the Hundred of Lowdon.

Hill. 1651. Banc. sup.

Arrest of Iudgement in an Action upon the Statute of Winchester for robbery.

Crosthwayt brought an Action upon the Statute of Winchester of robberyes, against the Hundred of Lowdon, for being robbed of 160 l. and had a verdict against the Hundred. It was moved in arrest of Judgement, that the Action upon the Statute, did not lye for the party that brought it,

for

for it appears that he was not robbed; but that the mony was taken out of a portmantle, which was carryed by the post-boy, and that only the Plaintiffs hand was upon one end of the portmantle, so that the post-boy was robbed, and not the Plaintiff. But Roll chief Iustice answered, there is no question but that this was a robbery of the Plaintiff, and it is all one as where my Servant is robbed in my presence, and there the goods shall be said to be in my possession, and so is it here, and therefore let Iudgement be entred, nisi. Robbery. Possession.

Tayler and Web.

Hill. 1651 Banc. sup.

Ant. 308.

This case formerly argued at the Bar, and broken on the Bench, and some opinion delivered in it, was again moved by Maynard, and argued by him. And he said that by the Will no land passeth, because lands are not mentioned in it, neither is there any necessary implication, that the Testator intended to devise his lands, for the making one his Heir, and enjoyning him to pay an annuity doth not convey the lands to him, and the Will doth not say that he makes him his Heir of his lands, but generally his Heir, which by the civill Law may be of goods; and for the enjoyning him to pay the annuity, this may be out of other lands in consideration of the personal estate given unto him. In Danyel and Vblies case, a gift made by a Feme coparcener of her purparty of land, did not convey the lands in Fee. In Marshes case, the Father gave his lands to his two Sons to be equally divided, it was adjudged there, that only an Estate for life passed, and here is nothing at all expresly given. In Gilbert and Withers case, Mich. 20 Iac. It was adjudged that there ought not to be made such a construction of a Will, as is not agreable to Law. And this is only a logical Will by way of argument, and not a grammatical, and positive Will. Roll chief Iustice answered, to make a construction of a Will where the intent of the Testator cannot be known, is intentio cæca & sicca; but here although the words of the Will be not proper, yet we may collect the Testators meaning to be, by making of the party his Heir, that he should have his lands, and it is all one as if he had said Heir of his lands, and here he not only makes him his Heir, but his Executor also, and therefore if he shall not have his lands, the word Heir is meerly nugatory and to no purpose, for by being Executor only, he shall have the goods, and as it hath been observed, he is in this case hæres factus, though not natus. Ierman Iustice to the same effect, and said that the word Heir implyes two things. 1. That he shall have the lands. 2ly. That he shall have them in Fee simple. Nicholas and Ask Iustices concurred, and so it was ruled that Iudgement should be given for Sir Iohn Bridges the Devisee, nisi. Special Verdict upon the words of a will. Construction or Interpretation. Will.

Lockoe against Palfriman.

Hill. 1651 Banc. sup.

Hill. 1651. rot. 1002.

Upon a special verdict found in an ejectione firmæ, the case fell out to be this, Tenant for life, the remainder to Baron and Feme, and their Heirs, Baron and Feme suffer a recovery, The question was, whether the Special verdict in an ejectione firmæ.

the Heirs of the Feme were bound by this recovery, because the Feme being covert it was conceived she was not Tenant to the præcipe, because it appears not she was examined, and so nothing was recovered from her. It was argued that this recovery did bind the Feme. 1. because if a precipe be brought against one who hath nothing in the land, the writ only is abatable, Fitz. Tit. Droyt 29. Next an Estople with recompence excludes not only parties and privies, but also strangers, as it is in Shellyes case, and 3 Iac. C. B. in Duke and Smiths case, 15 E. 4 f. 28. In 43 Ed. 3. f. 48. was the first mention of examination of a Feme upon a Recovery, and she shall be intended to be examined here, if it be requisite; for it is not found she was not examined, and in Br. Abridg. recovery in value 27. 23 H. 8. It is held that a Feme Covert is barred by a Common recovery, and this hath been the continual practice since that time; and whereas it is objected, that a colourable recovery doth not bind a Feme Covert, it is answered, that this is not a colourable recovery, but a judicial matter of Record, and is brought upon an original, and there is an intended recompence to the Feme, and to urge that there is no Tenant to the præcipe, is an objection which reaches to the common practice of assurances, and therefore not to be admitted, and in time they might have counterpleaded the voucher; but now they cannot avert this matter against the Record, 19 E. 3. estople 9. and though the Feme be not examined, yet she shall be bound by this recovery, though in a fine it is otherwise, where there is no recompence in value, as here there is, and in a fine the Judge ex officio is bound to examine the Feme, but not in a recovery, nor is there any practice of it in Law, 13 Ed. 3 Iudgement 29. A partition made by writ shall bind a Feme Covert, because she hath a recompence, so is it upon a partition made upon Record in Chancery. And by the Barons surviving the Feme here, the recompence doth not survive to the Baron, but shall go to the Heirs of the Feme, Br. recovery in value 2. 2 Iac. C. B. here is a reall Estate in the Baron and Feme. Hales on the other side made the question to be, whether by a recovery had where the Feme being Covert is not Tenant to the præcipe, she shall be bound by it, and he said she is not. In other cases the party may be bound by estople, namely where he might have pleaded to the writ, or might have counterpleaded the voucher; but here the Feme is not subject to be admitted to these things, 17 E. 3. f. 37. and the Feme Covert here, is not so concluded by her admission, that she shall not be admitted to speak against this recovery if she survive her husband, neither are her Heirs concluded if she do not survive, although peradventure as to the warranty they may be concluded, 20 Ass. pl. 7. 11 E. 3 Fitz. voucher 143 2 E. 3. Fitz. estople, 246. 21 E 3 13. and the recovery here is not duely had, because there is no tertenant. Roll chief Iustice said, it is not to be questioned whether a recovery bind a Feme, for it is the Common practice. 2ly. It is not necessary to examine a Feme Covert upon suffering a recovery, although it be a prudent all thing to do it; but if it be not done, it is not averrable that it was not done; but the single question material here, is whether the Feme be Tenant to the præcipe or not, so that she shall be estopped to speak against the recovery, and he held she was estopped, for she joyns in the recovery with her Husband, and here is no default made by the Baron, and now the record is perfect, and a thing contrary to it ought not to be averred against it; but before the Record was perfect she might have pleaded, and the recompence in value here shall go to the Heirs of the Feme, and the Tenant for life is also bound by this recovery, and the Feme is party, and also privy to the recovery, and therefore if it will bind her, it will bind her Heirs also. If a stranger had been Tenant to the præcipe, and the Baron and Feme had

Recovery. Examination. Averment.

Feme Covert

Plea.

Party and privy.

had been vouched, the Feme had been bound, and this is a ſtronger caſe, and this caſe may concern many mens eſtates, and therefore ſuch recoveries are not to be queſtioned. Therefore let the Plaintiff have his Iudgement, niſi.

Hill. 1651 Banc. ſup.

ONe Turner and Marian were Bail for one by the names of Turner and Mary, the Court was moved that the name Mary might be made Marian. But Roll chief Iuſtice anſwered, let the party come and find other Bail, for upon the matter this is no Bail.

Motion to alter the name of a Bail. Amendment. Bail.

Hill. 1651. Banc. ſup.

AN Endictment was removed by a certiorari into this Court, and the Court was moved for a procedendo, becauſe no Bail was put in here. Roll chief Iuſtice anſwered, If no Bail be put in, you may proceed below without any procedendo.

For a procedendo.

Hill. 1651. Banc. ſup.

THe Court was moved to ſuperſede an Execution againſt one, quia erronice, becauſe he was taken in Execution, whereas there was no declaration given againſt him in the Term time as it ought, becauſe the party was in cuſtodia, and the Declaration againſt him was upon the by, viz. at another mans ſute, and not at his at whoſe ſute he was in cuſtody. Roll chief Iuſtice anſwered, if it be a Declaration on the by, it ought to be given in the Term time.

To ſuperſede an execution.

Hill. 1651. Banc. ſup.

VPon a rule to ſhew cauſe why an attatchment ſhould not be granted againſt Cox an Attorney of this Court, and Maior of Newberry, for iſſuing out of Execution upon a iudgement given there, after a writ of Error brought, and allowed there, Wild ſhewed for cauſe that the Maior was enformed by Councell, that the Record was not removed thence, becauſe the writ of Error was not good. This was allowed for cauſe, and the former rule diſcharged, quod nota.

Cauſe why no attatchment.

Hill. 1651. Banc. ſup.

LEtchmore moved the Court that the word publicæ might be put into an Endictment which was removed hither by a certiorari. But the Court anſwered it could not be; but becauſe the endictment was of another Term, the Clark of the peace was fined at 10 l. for his careleſſeneſſe, and groſſe overſight.

To mend an endictment. Amendment. Fine.

Pasch. 1652. Banc. sup.

For a habeas corpus for one committed by an order of Sessions of the peace. Surety.

The court was moved for a habeas corpus, for one that was committed to prison by an order of Sessions of the peace, untill he should find sufficient suretyes for the peace, whereas he had tendred suretyes which would not be accepted; but extraordinary suretyes were required, such as he was not able to procure. Roll chief Justice answered, a thousand pound bond may be required, for the keeping of the peace as, the case may stand, viz. if the party to be bound be a dangerous person. Yet take a habeas corpus, but be sure you bring good suretyes.

Pasch. 1652. Banc. sup.

Wager of law waived and a plea put in.

An action of debt was brought against one for 50 l. due for divers pieces of linnen cloath sold to the Defendant. The Defendant was ready at the Bar to wage his Law; but the Court being enformed that the Defendants wife kept a shop, and used to buy and sell by her husbands privity and allowance, and that these parcells of cloath were bought by her to furnish her shop, and that the Defendant her husband, although he was a Sea man, and medled not in buying and selling of any of the wares in the Shop, yet his wife did it by his allowance; Roll chief Justice advised the Defendant to take heed he waged not his Law, for that he could not do it with a good conscience, because his allowance of his wifes buying the wares was all one, as if he had bought them himself, and counselled him to plead, to which the Defendant consented, and the ley gager was waived by consent of the partyes, and an emparlance given till the next Term.

Emparlance.

Dudley against Born.

Pasc. 1652. Banc. sup.

Motion to put in security for costs denyed.

The Court was moved on the part of the Defendant that in regard, the Plaintiff had obteyned the cause between them to be tryed at the Bar, that therefore he might be ordered by the Court, to give security to pay the costs, in case the tryal should be against him; But the Court would make no such rule; but said, if he will not pay the costs in case the verdict be against him he shall take no benefit here, afterwards upon it.

Garland against Yarrow.

Pasc. 1652. Banc. sup.

Hill. 1651. rot. 1295.

Arrest of Judgment in an Action for words.

The Plaintiff brought his Action upon the case against the Defendant for speaking these scandalous words of him, viz you are a knave, and keep a bawdy house; after a verdict for the Plaintiff it was moved in arrest of Judgement that the words are not actionable. 1. Because the words spoken are of spiritual conusance, and punishable in the eccles-

Eccleſiaſtical Court, and not at the Common Law. 2ly. The party may keep a Bawdy Houſe, and not know it to be ſuch, and then he is not puniſhable for it, and ſo cannot be prejudiced by the ſpeaking of the words. 3ly. There is no Statute againſt keeping of a Bawdy houſe as the Declaration lays it, but for keeping of a Common Bawdy houſe. But Ierman, Nicholas, and Ask Iuſtices. (Roll chief Iuſtice being abſent) held that the words are actionable, for the keeping of a Bawdy houſe is an offence puniſhable at the Common Law, as being a miſdemeanor and breach of the peace, and therefore ordered judgement to be entred, except cauſe ſhould be ſhewn to the contrary Saturday next. Caſe.

Green againſt How.

Paſch. 1652. Banc. ſup.

Entred Hill. 1651. rot. 1295. Q.

PAnel moved for How the Defendant to arreſt judgement after a verdict given againſt him for Green the Plaintif in an action upon the Caſe brought, for ſpeaking theſe words of her, viz. You are a Whore and a Iade, and a ſtrumpetly Whore, and I will prove you a Common Whore; his Exception was, that the words are not in themſelves actionable, for they are but words of choler and heat, and the Plaintif is not brought within danger of the late Statute made againſt whoredom, by the ſpeaking of them, and he cited for authority Freeman and Childers caſe, Trin. 1651. rot. 45. where theſe words, viz. You are a Whore, & I will prove you an arrant Whore, were adjudged not actionable. The rule was to ſtay judgement till the Plaintif ſhould move. Arreſt of Iudgement in an Acti upon the Caſe for words.

Baicock againſt Tompſon.

Paſch. 1652. Banc. ſup.

Mich. 1650. rot. 444.

IN an Audita querela the Caſe was this, An Action of Debt was brought againſt the Principal, and a judgement upon a nihil dicit obtained, but no capias ad ſatisfaciendum iſſued forth againſt him; Afterwards 2 ſcire facias were taken out againſt the Bail, and 2 nichils thereupon returned, and thereupon judgement was given againſt the Bail, who thereupon brings his Audita querela. The Queſtion was, whether the Audita querela did lie or not, in regard that the ſcire facias iſſued forth againſt the Bail before any capias ad ſatisfaciendum was taken forth upon the judgement, upon the nihil dicit againſt the Principal. Green of Counſel with the Defendant held, that the Audita querela did not lie, becauſe that the party hath other remedy to relieve himſelf, and therefore the Audita querela lies not, for that is given only where the other party hath no other remedy, 21 E. 3. f. 14. Brook Audita quer. 18. And beſides here are two nichils returned againſt the party, which do amount to a ſcire feci, and ſo the party is warned, and therefore he comes now too late to have his Audita querela, for here is as much as a judgement by default after an appearance, and here is no releaſe, and there is a judgement executed and in force, and not reverſed by the Principal, Green and Le Grices caſe, Paſch. 39. Sir Francis Mores Reports. Wild for the Plaintif held, that the Audita querela did Where an Audita querela lies for the Bail upon an erronious judgement againſt the Principal.

well lie, because that no scire facias ought to have issued against the Bail, before a capias ad satisfaciendum taken forth against the Principal: And an Audita querela is in the nature of a sute in Chancery, and the party comes soon enough here to be relieved, though the scire facias be returned, for the return thereof shall not bar him from his Audita querela, although it be now too late for him to reverse the judgement by a writ of Error, and the books 21 E.3.13 and Kelw. 23,24. are in the very point. And the party by the return of the 2 nichils is not in Court; And in Mores Reports, in Hobs and Todcasters case 38 Eliz. it is adjudged that an Audita querela doth lie. Roll chief Justice, when one is Bail in the Common Pleas, he is bound to bring in the body of the Principal, or to pay the debt: And Pomeroys case is, that until a Capias be returned against the Principal the Bail cannot forfeit his Recognisance, for the non-appearance of the Principal, for the filing of the Capias is not sufficient, but it must be returned. And this was the antient course there, and the Law so held to be; but by usage of later times and out of indulgence shewed to the Bail it hath been held sufficient for the Bail to bring in the principal after the return of the Capias, and now at this day, out of greater indulgence afforded unto the Bail, it is well enough if the Bail bring in the Principal at any time before the return of the second scire facias, but after it is returned, then it is too late for him to bring him in, and that is the reason that in such Case a writ of Error lies not for the Bail to reverse the judgement against the Principal. If a scire facias be brought against the Bail, and he pleads that the Principal dyed before the return of the Capias against him, it is adjudged to be a good plea for the Bail to discharge himself; but to plead he dyed after the return, is not good: And it is a good plea for the Bail in a scire facias brought against him to say, that no capias was returned against the Principal; And here is a good discharge in Law against the Bail. But the question here is, whether the return of the two Nichils be not a Bar to him now, and that he hath not thereby lost his advantage to bring his Audita querela, because by the return thereof the party is supposed to have notice, and therefore a writ of Error clearly lies not to reverse this judgement, though it be upon a nihil dicit. And as to that, in as much as the party hath no other remedy to help himself, and it is apparent that he is damnified by an undue judgment, it is reason he should bring his Audita querela. Barns and Corbets case. The Bail cannot say the Principal hath paid the money, if he have not an acquittance or matter of Record to prove it; and in Sir John Mounsons case upon two nichils returned adjudged, that the party might have his Audita querela, and therefore the Plaintif ought to have his Judgement. Jerman Justice dissented. But Nicholas Justice, absente Ask, agreed with Roll and said, that for want of the return of the Capias the judgement was erronious, and the 2 scire facias might be returned behind the parties back, & therefore it could not be said to be all one, as if the party had appeared, for if he had appeared the Case would have been otherwise, So Judgement was given for the Plaintif, nisi, &c.

Bail.

Recognisance. Forfeiture.

Error.

Plea.

Audita querela.

Pasch. 1652. Banc. sup.

One brought by Habeas Corpus from the Fleet remanded.

MEmorandum, One was brought into the Court by the Mareschall of the Fleet, by vertue of a habeas Corpus directed to him out of this Court, and because it did appear upon Record that the party was charged with divers debts, when he was turned over to the Fleet, he was not suffered to put in Bail here, but was remanded.

Gos-

Gossage against Tayler.

Pasch. 1652. Banc. sup.

Hill. 1650. rot. 117.

In an Ejectione firmæ upon a Lease for years of a Messuage, and certain lands in Hatfield Broad-Oak in the County of Essex, upon a special verdict found the case fell out to be this, Rich. Frank seised amongst other lands and Tenements of the Messuage and lands in question, upon the marriage of his Son Leventhorp Frank with Susan Cotele, levies a fine of the lands to the use of himself during his own life, and the life of Leventhorp his Son, and after during the life of Susanna Cotele the wife of Leventhorp, the remainder to the use of the heirs to be begotten upon the body of Susanna by Leventhorp her Husband. The question here was, whether the word heirs shall be intended the heirs of Leventhorp and Susanna his wife, or whether the estate shall be intended to be limited to the heirs of Susanna only, and that Leventhorp shall have barely an estate for life in the lands. Serjeant Glyn of Councel with the Plaintif held, That Susanna Cotele hath an estate tayl executed in the lands, and that the word heirs shall relate only to the heirs of Susanna, and not to the heirs of Leventhorp, 1. Because that here is an estate limited for life unto Susanna by an express limitation, and her heirs shall take immediately after the estate for life ended, and they shall not come in as purchasors. By express Terms the word heirs is not limited to any person, but it is left to the construction of the Law, and that doth apply it to Susanna, as to a person to whom Richard that setled the lands hath expressed most affection, as appears by the Deed, Lit. f. 6. Sect. 28. There is an expression of the party to whom the word heirs shall relate, but so is not here, and therefore the cases differ. In 3 Ed. 3. f. 31, 32. It is ruled that both parties have an estate tayl, because the estate is limited to both, but so it is not in our case, so those books are not against me. In our case, it doth not appear that Richard did intend to advance the Husband of Susanna, and therefore it is not reason that the word heirs should relate to him, but to Susanna his wife only, for in case of limitation of estates the intention of the party is to be considered, and doth direct the matter, and the preceding limiting of the estate to Susanna, and not to Leventhorp, doth shew that the party did mean to promote the heirs of Susanna. Lit. Sect. 27. Dyer 27. A second reason is drawn from the penning of the deed, which in the limitation of it doth enclyne more, that the word heirs should be applyed to Susanna than to Leventhorp; for the words upon her is as much as to say of her, and then it is the same case with Littletons case. 3ly. The Intention of the Donor appears to be such by the circumstances of the entire limitations, which do shew that he did intend that Leventhorp should not have such an estate whereby it should be in his power to deprive his issue, and therefore the word heirs are to be applyed to Susanna, and not to Leventhorp; for if it should be applyed to both, then Leventhorp might destroy the estate of the issue, contrary to the Donors intent; And whereas Dyer 99 is objected against me, I answer, that case is not against me, for there the word heirs is expressly limited to a certain person, viz to the heirs of the body of both of them, but so it is not in our case; and whereas Hill. 13 Iac. Lane and Panels case in this Court is also objected against me, I answer, that that case is in effect the same case with Dyer, and the question in our case came not in dispute. And the will of the Donor in deeds is to be observed. Lit.

Special verdict in Trespass and Ejectment.

22. C. Tayl. 1. rep. Shelleys case 103. Notwithstanding in gifts in tayl this rule holds not, so that a gift in tayl may be limited contrary to the rule of the Common Law. And I know not of any authority in print, or writing against me; but in 13 Ed. 3. Fitz. tit. variance 81. there is an expresse authority for me, and 4 H. 4. Fitz. br. 448. & in my experience I have known many estates limited as this is in the Southern parts, & held good estates tayl, & if it should be otherwise, many estates would be shaken. Roll chief Justice. We have delivered our opinions before, against you, viz. that it was not the meaning of the donour, to apply the word Heirs to the body of Susanna only, for this construction would offer violence unto the words, as appears by Littleton, who interprets that they are to be applyed to the Heirs of both the partyes, and your reason is founded upon a wrong ground, and expresly against Littletons case; and for your second reason it is of no waight, for the words are all one as if he had said to the Heirs of the Husband and wife, begotten upon the wife. 3ly. We are not to frame a meaning against plain words, which shew the Donors intent to be against you. And the Baron cannot Bar the Estate tayl as you suppose; for the Feme hath an Estate for life, and if she survive she may revive the remaining Estate, and we must not consider of inconveniences, which possibly may happen against the expresse words of the deed, and the multitude of conveyances made in this manner, are of no force to alter the Law. Ierman Iustice as Roll, That the word Heirs shall be applyed to the Heirs of both partyes; because voluntas donatoris secundum formam chartæ expressa est observanda. Nicholas and Ask Iustices of the same opinion.

Tayl.

Garland against Yarrow.

Pasc. 1652. Banc. sup.

Arrest of judgement in an Action for words.

THis case being in arrest of Judgement (formerly spoken unto) in an Action upon the case for these words, you are a knave, and keep a Bawdy house, was again moved by Christ. Turner, who held that the words are not actionable. 1. Because they are of spiritual cognisance. 2ly. It is not said that he kept a common Bawdy house. 3ly, here is no special damage laid, 10 Car. These words he is a pimp adjudged not actionable in Lewis and Whittons case. 4ly, It is not alleged that he willingly kept a Bawdy house, and then he is not punishable. Pepes on the other side held the words to be actionable, and cited Hill. 3 Car. Elsey and Harisons case, thou art a whore, and a Bawd to thy daughter, and keeps a Bawdy house, which words were adjudged actionable, 24 H. 6. 14. 38, 39. Eliz. In the Lady Barkleys case, the keeping of a Bawdy house is an offence punishable at the Common Law, and therefore the words spoken are actionable. Roll chief Iustice, To call one whore in London is Actionable, And the words here are actionable, for the keeping of a Bawdy house is a crime punishable at the Common Law, for the party may be endicted for it, and it shall be intended to be a common Bawdy house, although it be not so expressed, and the Plaintiff is scandalised by the speaking of the words. Ierman Nicholas and Ask Iustices were of the same opinion. Iudgement was given for the Plaintiff, nisi.

Case.

Endictment.

Snelgrave

Snelgrave and Bosvile.

Pasc. 1652. Banc. sup.

Mich. 1651. rot. 200.

BOsvile brought an Action of debt against Snelgrave, as Heir unto his Father, upon an Obligation entred into by him unto the Plaintiff, the Defendant pleads riens per discent jour del bref. the Plaintiff replyes, that he had lands by descent, and upon this an issue is joyned, and the Jury find he had lands by descent, and name them particularly, and upon this a Judgement is given for the Plaintiff in the Common pleas, that he shall recover his debt of the lands descended, upon this Judgment a writ of Error was brought here, and the Error assigned was, that the Judgement ought to have been given generally against the Defendant, and not particularly of the lands descended. 2ly the Jury ought not to have found what lands particularly the Heir had by descent; but generally that he had lands by descent, because the issue is general, whether he had lands by descent or not, and therefore the Judgement given upon this ill verdict is not good. Roll chief Justice, The Judgement is unwarrantable, for the verdict is against the issue joyned, and the Judgement here ought to have been generall of all the lands and goods, and against the person of the Heir for his false plea, and not particular to recover of certain lands, as it is here, for this is not so good a Judgement for the Plaintiff, as the general Judgement is, and this Judgement may be against the Plaintiffs mind, for any thing doth appear to the contrary, and a like Judgement was reversed in Alleyn and Holdens case in this Court. Ierman Nicholas and Ask of the same opinion. And thereupon the Judgement was reversed.

Debt against an heir upon an obligation.

Judgement. Verdict.

Error.

Floyd against Morgan.

Pasc. 1652. Banc. sup.

A Writ of Error was brought to reverse a Judgement in an Action of Trespasse, for taking away of certain Houshold stuff, and the Error assigned was, that the Declaration was incertain, for that it wanted latin words to expresse the things, for which the Action was brought, for the Declaration is for the taking away of quoddam instrumentum ferri, Anglice a gridiron, et quoddem instrumentum ferri Anglice a morter et quædam instrumenta ferri Anglice brandirons; which are words utterly incertain for the generality of them, what they may signifie. Roll chief Iustice, My Judgement is that the Judgement is erroneous, for we must not take meanings; because we are bound up to proceed by the rules of the Law, and Statutes, and we are to consider here whether there be Latin words in the Declaration, as there ought to be to expresse the things, for which the Action is brought, and certainly this word quoddam instrumentum ferri is too general to expresse any thing, and the Anglice added to it will not help it; for if the word precedent, in it self, be not fit Latin to expresse the thing the Anglice subsequent is litle to be regarded, and these words being incertain the Declaration must be incertain, and so the Defendant cannot know what to answer to it, or how to defend himself as he ought to do, which may prove very prejudicial to him. Ierman Iustice, That issue cannot be certain, if the Declaration be incertain, and by the Common

Error to reverse a judgment, a trespasse for taking away of goods.

Anglice. Declaration.

Issue.

Common Law and Statute Law our pleadings must be Latin, and where there are not elegant Latin words to expresse things, we may use those which they call barbarous words, if they be known, for use makes a language, and where there are no Latin words, we may coyn words, and add an Anglice to them, and here the Declaration is as incertain also, for the number of the things, as for the nature of them, for here is quædam instrumenta ferri, which may signifie any number be it more or lesse, Nicholas and Ask ad idem. And so the Iudgement was reversed, nisi, Antea.

Brian against Twite.

Pasc. 1652. Banc. sup.

Arrest of Iudgement in an Action for words.

AN Action upon the Case was brought for speaking these words of the Plaintiff; you are a whore, and have plaid the whore with so many men you cannot number them; upon not guilty pleaded, and a verdict for the Plaintiff, it was moved in arrest of Judgement that the words are not actionable, for the saying the party had plaid the whore are words incertain, and do not enforce any Act of whoredom to be done by her; but Iterman Iust. ce absente Roll chief Iustice gave Iudgement for the Plaintiff, for he said the words should be construed to a common intendment.

Motion for Iudgement denyed.

THe Court was moved for Judgement, upon a verdict given 2 years since, and the cause staied till now by the Committee of indempnity; but it was denyed, because it was the last day of the Term. Nota.

Pasc. 1652. Banc. sup.

Certiorari to remove an endictment.

IT was shewed for cause why a certiorari should not be granted to remove an indictment of battery, against an Attorney of his Court, preferred at a Sessions of the peace in the Country, that the bill was found there, and the party hath entred into a recognisance there to go to a tryal the next Sessions. Roll chief Iustice, The recognisance may be also removed by the certiorari, and what hurt can it be if the endictment be removed, and the tryal had at the assises, and if it be removed hither, we will not quash the endictment; but the party shall plead and carry it down, and try it at the next assises at his own charge.

Byron against Stonehowse.

Pasch. 1652. Banc. sup.

Trin. 1651. rot. 1658.

Error to reverse a judgment in dower in the common pleas.

A Writ of Error was brought to reverse a Judgement given in a writ of dower in the Common Pleas, the Errors assigned were, that the Judges of the Common Pleas had set aside the verdict taken by default by the Iudge of assise, because it ought not to have been taken, but a petite cape of the lands awarded, whereas though this was a fault in the Iudge to take the verdict, yet this is to be amended by a writ of Error, for the Iudge of assise, and the Judges of the Common pleas in this case are but as one Judge, Dyer f. 194. f. 76. and here is a waiver of the default, because the enquest was taken at the prayer of the party, 27 H. 8. f. 18, 10 H. 7. f. 21.

And

And the Demandant may releaſe the default either expreſly, or implicitly, 3 H. 6. f. 48. 10 H. 7. f. 21. 3ly. Here is a diſcontinuance which is not helped, becauſe the Enqueſt is taken, by default, and the Tenant by the Judges taking advice is out of the Court, 7 H. 4. f. 14. pl. 13. Here is day given in Court to the Demandant, but not to the Tenant, and the Judges cannot adviſe afterwards. And here the judgment is given upon a default after a default, whereas the 2d. default was the ſame day with the 1. & not at another day, as it ought to have been. Hales on the other ſide held that the judgment was not erroneous, for here is no judgement, but only an awarding of the Enqueſt, and if it be not good, it is done by thoſe that had no power to doe it, and ſo not material, and the Judges of the Common place have a diſtinct authority from the Judge of the niſi prius. 2ly. Here is no releaſe of the default nor Enqueſt, nor can the Judge of the niſi prius take a releaſe of the Default; for by awarding the default the power of the Judge of the niſi prius is determined: And the releaſe ought to be of the default, upon which the judgement ſhould be given, and it is not ſo here. Next here is no diſcontinuance, for it is not neceſſary to give day to the Tenant by the Curia adviſare vult, for then there could be no petite Cape; And the judgement here is good, for there is no other day of default. Roll chief Iuſtice, The Judge ought to have called the Tenant, or to award a petite Cape of the land, and not to have taken the Enqueſt by default; but here the Judge of Aſſize did not award a petite Cape. For the 1 Exception, The Judge of the niſi prius had no authority to take the verdict, and ſo that is done coram non judice, and ſo the nullo habito reſpectu to the Enqueſt by the Judges of the Common Pleas is good enough, and ſo they may in that Court award a petite Cape, and they may alſo adviſe, and there is no need for them to give a day of continuance to the party, for that were to take away that of which they would adviſe, and the ad alium diem is alſo good, and ſo there is no Error in the judgement. Affirmetur niſi.

Verdict by default. Petit Cape. Error.

Doctor Trigg againſt the College of Phyſicians.

Trin. 1652. Banc. ſup.

Hill. 1651. rot. 1145.

A Writ of Error was brought to reverſe a judgement given in the Common Pleas for the College of Phyſicians againſt Doctor Trigg in an action of debt brought upon the Letters Patents, and Stat. of 3. H. 8. for practiſing Phyſick without licence. The 1 Error aſsigned was, that it is ſaid that quidam Willielmus Trigg, and ſo it may be intended another party, and not the ſame, whereas it ought to have been prædictus Willielmus Trigg. But to this Roll chief Iuſtice anſwered, that the party came in and pleaded, and ſo he muſt néeds be the ſame party. The 2 Error was, that the Judgement was wholy given for the Preſident of the College of Phyſicians, whereas it ſhould have been given part for the Preſident, and part for the King. Hales in maintenance of the judgement anſwered, that the judgement is to be given for the party who brings the Action, and if the Action had been brought by the King only, Judgement ſhould have been given for him only, yet the money recovered ſhall be diſtributed as the Statute directs. Roll chief Iuſtice, The King may be better truſted than a Common Informer; So the Caſe is not alike, where the King brings the Action, as where the Informer brings it, for the

Error to reverſe a judgement for practiſing Phyſick without Licenſe.

King may receive all the money, and the Informer may have his part by Petition to the King, and here neither the Information nor the Verdict is pursued, for that is eam pro Domino Rege quam pro seipso, &c. and here the Judgement is only for the Informer. The King may if he will, sue alone and have Judgement for all, if he begin his sute before the Informer, but if he begin it afterwards, the Informer shall have his part. And if the King do inform eam pro seipso, as for the College, there the College shall have its part. For these reasons the Judgement is not good, Therefore let it be reversed, nisi.

Judgement.

Trin. 1652. Banc. sup.

The Court was moved to vacate a latitat that issued out of this Court erronice, for that it was made retornable two days before the Term Ierman Iustice, Take a supersedeas.

To vacate a Latitat. Supersedeas.

Godwin against Batkin.

Trin. 1652. Banc. sup.

Hill. 1650. rot. 1477.

A Writ of Error was brought to reverse a Judgement given in an Action of Trespas upon the Case in the Court at Burton upon Trent, wherein the Plaintif declared, that the Defendant, in consideration that he was indebted unto the Plaintif in 20 l. did assume and promise to deliver divers Cattel to I. S. to the use of the Plaintif, and for non performance of this promise he brought his Action, and had a Verdict and a Judgement. But the Iudgement was reversed, because the Court held that here is no consideration expressed which can relate to the discharging of the debt of 20 l. and so the promise is but nudum pactum, and the Plaintif is, notwithstanding the promise, at liberty to bring his Action against the Defendant for the money.

Error to reverse a judgment in an Action upon a promise.

Consideration.

Nudum pactum.

Child against Sir Iohn Lenthall.

Trin. 1652. Banc. sup.

An Action of Escape was brought against Sir Iohn Lenthall as Mareschall of this Court, wherein the Plaintif declared, that whereas I. S. was indebted unto him by Obligation in a certain sum of money, and was thereupon by a latitat out of this Court arrested, and did thereupon put in Bail, and did appear to the Action, and the Plaintif obtained a Iudgement against him, who thereupon in discharge of his Bail did render himself to Sir Iohn Lenthall in Execution, and that afterwards Sir Iohn Lenthall had suffered him to escape, per quod, &c. to this Declaration Sir Iohn Lenthall pleaded, and a Verdict was had against him. Wild in Arrest of Judgement takes these Exceptions to the Declaration. 1. It saith that the Principal rendred himself in Execution to discharge his Bail, and saith, that afterwards he escaped, whereby he could not have him in Execution, which seems contradictory to what he formerly said. 2ly. He saith that he rendred himself to the Mareschall, whereas he ought to say that he rendred himself to the Court; for it is the Act of the Court that turns him over to the Mareschal. Roll chief Iustice, He cannot render

Arrest of Iudgement in an Action for an escape.

der himself to Sir Iohn Lenthal in discharge of his Bail; for only a Judge can take and discharge a Bail, and not Sir Iohn Lenthall; but here it is that he did it in Court, and therefore it is well enough; for he may render himself to Sir Iohn Lenthall in Court, though out of Court he cannot, and therefore let the Plaintif have his Iudgement. Bail.

Rogers and Dove.

Trin. 1652. Banc. sup.

Pasch. 1652. rot. 354.

IN an Action of Trover and Conversion for 3 Cart loads of Oats, Barlie and Pease, The Defendant pleaded a special Plea to this effect. That the land where the Trover was supposed to be is 5 acres of land lying in B. and that is within the County Palatine of Chester, and that he holds the land for term of years, and by vertue thereof did sow and take the Corn thereupon growing, and traverseth the Conversion out of the County Pallatine, and avers that there are Courts of Iustice held within the County Palatine, so that Iustice may there be had, and says, that he ought to be sued within the County Palatine, and not elsewhere, and therefore demands Iudgement if he ought to be sued in this Court. To this plea the Plaintif demurred, and shewed for cause, that the Action being for a transitory matter, it may be tryed out of the County Palatine as well as within, although if it were for a local matter it would be otherwise, and the party here hath pleaded not guilty, which may be tryed any where, Cooks Instit. 282. In some Cases an Obligation bearing date at Chester may be sued in another place, 19 E. 3. Fitz. Gar. 29. 45 Ed. 3. Fitz. visne 50. 9 Iac. C. B. Richardson and Meares, a Battery in Chester tryable out of it, 11 H. 4. f. 40. Crompton Iurisdiction of Courts, f. 213. Transitory things emergent in the County Palatine of Chester may be tryed else-where, 45 E. 3. f. 17. And so it was prayed the Defendant might plead over. Serjeant Glyn on the other side held, that this plea was a good plea to the Iurisdiction of the Court. Here are many matters of fact confessed, and the matter in Law is, whether the title of the land within Chester shall be tryed out of that jurisdiction. In 31 Ed. 1. in the Exchequer it is clear they have conusance of Pleas. Roll chief Iustice to that answered, but it is not that they shall be removed thence; Serjeant Glyn proceeded and said, that also upon a reference to 4 Judges by Queen Elizabeth, it was certified, that all Actions real and personal arising in Chester are tryable there, and not elsewhere, 22 E. 4. Fitz. Iurisd. 61. 21 H. 7. f. 23. 1 H. 7. 26. 10 H. 6. 14. 2 H. 4. f. 25. As to the Objection, that this is a clear personal Action, and therefore transitory. 1. I deny the authority of Cook in his 4 Institutes cited on the other side. Next the Action here by the pleading of it is made real, and then though Cooks opinion should be Law, it comes not home to our case, and a transitory action may be made real by the pleading of it, 27 H. 6. f. 1. Hill. 38 Eliz. Banc. sup. Hill. 2 Car. in Belamy and Bolthorps case in this Court, 6 rep. 14. A thing is tryable there where the best conusance of it may be had, 6 H. 7. 2ly. The averment of the party here is, that all actions personal and real within Chester are tryable there, and this being matter of fact is confessed by the Demurrer, 9 H. 7. Porter & Nicholls in the Exchequer 10 Car. And it would be a great inconvenience to try the title of lands lying within Chester out of it, for so all causes real may as well be tryed in forein Counties, even through all England, which would be very mischie- Argument upon a Demurrer to a Plea to the jurisdiction of this Court.

Tryall. vous. Roll chief Justice, If we can avoid it, it is not good to try causes in forein Counties; but here you have by your demurrer confessed, that all causes real and personal shall be tryed there, and what say you to that? Traverse. Waiver. Issue. 2ly. It is to be considered whether your Traverse be not repugnant to your Plea, for you have waived the plea to the jurisdiction of the Court, and put your self upon an issue by the traverse, which you ought not to have done; but you ought to have relyed upon your plea to the jurisdiction of the Court, for as the traverse is taken, untill a tryall be had in the cause, we cannot tell whether the Trover and Conversion be within the County Palatine, or out of it, and this is matter of substance, and tryable, and therefore it would be hard to maintain your plea. At another day the case was argued again, and first by Twisden for the Plaintiff, and he took three things into consideration. 1. Whether the plea were a meer plea to the jurisdiction. 2ly. Whether it be made good by the demurrer. 3ly. Whether the traverse have not spoiled the plea. 1. He held the plea was not good, because the Action is meerly transitory, and may be laid in any place, 2. Mar. Br. traverse 983. Cooks Lit. f. 202. and the Defendant cannot plead that the cause of Action lyes in any other place, than where the Plaintiff layes it, Cooks Jurisd. of Courts is full authority in point, what ever is objected against it, 30 H. 6. f. 6. I admit of the jurisdiction of the County Palatine; but yet it must not entrench upon the Common Law, and I admit all the books cited; but they are of other local matters, or of things transitory, which are fixed to Chester by the pleading of them, and Dyer 122 comes not to our case nor crosses the case of 10. Iac. 3. rep. Ridgwayes case, and here it shall be intended that the Jury may there have best conusance of the matter where the Action is laid, and not else-where, although the Action do favour of the Land. For the second matter the demurrer makes not the plea good, for the law sayes it is not good, and the partyes cannot alter the Law, Burtons case, 5. rep. f. 59. 5 H. 7. 1. 3ly. The traverse makes not the plea good, for the traverse is waived, and he relyes upon another matter, 5. Car. rot. 817. Burton and Cornish, the traverse taken, took away the justification before pleaded, so doth it here, and the traverse here is not good, because it is in a transitory matter. Where one justifies a thing done, it ought to be confessed that he did it, so if he traverse that he hath not done a thing here, it implyes it is done some where else. Latch for the Defendant made this question, whether upon the matter as it is here pleaded, the jurisdiction of this Court be taken away, and he held it is. It is the honour of this court to maintain the jurisdiction of all other Courts, and therefore I hope, it is not misbecoming me to put it in mind of this honour that belongs to it, I believe that according to the antient Law of the land, actions ought not to be laid else-where, then where the matter that caused them did arise, although that now by custom it is grown otherwise. Although the Plaintiff may fix a transitory Action, where he pleaseth in ordinary matters, yet he cannot do it where the matter ariseth within a speciall jurisdiction, as the case here is. It is not a good allegation that binds up the jurisdiction of this Court, except where it appears that the allegation is true, & the allegation here may well stand with law, it being in the Case of a County Palatine, which hath such a jurisdiction incident to it, & this Court Ex Officio ought to take notice of the Jurisdiction of the County Palatine and that they have authority to hold pleas, 45 Ed. 3. f. 10. 50 E. 3. pl. 10. 10 H. 6. 16. The averment is, that the party remains within the jurisdiction of Chester, that there may not be intended to be a failer of justice, by the parties going out of the Jurisdiction where the offence was done, 44 & 45 Eliz. Crisp and Decro. Neither is the plea

plea by the traverse become so vitious, as to retain the Jurisdiction of this Court thereby; For the County Palatine cannot give up their jurisdiction to this Court, as antient Demesn Courts, and other Courts may by the mispleading of the parties, for their pleading is coram non judice, 10 H. 6. 13. b. 9 H. 7. 12. 45 E. 3. f. 7. 22 E. 4. 23. 31 H. 6. 11. Nor doth the traverse here waive all the precedent matter, but stands with it although it be made narrower by it; but nothing is here waived, Dyer 165. Here is an issue in substance, which is good, although not in the letter, and the straightning of it shall not hurt, and the Court is neither inveigled, nor the party wronged by it, Dyer 369 Hob. 119. This traverse binds not the other party to joyn issue upon it; but there may be a traverse upon a traverse, and he may plead another plea, Hob. 18. Newmans case. Roll chief Justice, In your prescription you have averred that he was an inhabitant; but you have not averred that they ought to hold plea of transitory matters, if the party inhabit out of the jurisdiction, and here the party ought to be summoned, and if he dwell out of the jurisdiction, what remedy can be had against him then, for how can he be summoned? And we cannot judge of the jurisdiction; but by your pleading, and by your traverse you have tripped up your own heels. The reason why transitory actions may be laid in any County is, because that otherwise justice might fail, for the party may do a fact in one County, and then remove to another, so here the party may do wrong within the County Palatine, and then go out of it to avoid justice. At another day Wild argued for the Plaintiff, and Shafto for the Defendant. Wild held that the plea was ill, 1. In the inducement 2ly. It is ill in the substance of it, 3ly. The traverse is not good. The inducement is ill, because it doth not confess a conversion; but here is a general issue only pleaded, 9 E. 4. 5. 12 E. 4. 12. It is ill in the substance, because the usage pleaded is against Law, and will cause a failer of justice, which ought not to be, for the Law leaves no person wronged without a remedy, 19 E. 3. 29. Fitz. Iurisdict. 50 E. 3. pl. 10. 44, 45 Eliz. Crisp and Verols case, 2 R. 3. 4. Harid and Paytons case, 24 Car. 48. 2. instit. 4. Cook jurisdict. 213. 14 E. 4. 25. Next the traverse hath waived all the matter pleaded before, and because the plea was good before, there was no necessity to take it, 20 E. 4. 2. and the traverse is also too straight, for it hath tyed up the matter to Wellington, and so he prayed a respondes ouster. Shafto on the other side held the plea good, and argued much to shew the jurisdiction of the County Palatine, and cited Cook jurisdict. f. 219. 22 E. 4. 34. per collow, Dyer 156. Hill. 8 H. 7. rot. 228. and he said the plea is good, though it be not confined to the inhabitants within Chester, for there was no necessity to plead thus, and it had been enough to have pleaded generally, because this Court takes notice of the jurisdiction of Chester, 11 Rich. 2. Fitz. breif. and the pleading hath alwayes been in this maner, as may appear by the Book of entryes, 1 E. 4. f. 11. and this custom by construction of law, is necessarily to extend to the inhabitants within the jurisdiction, 21 H. 7. 40. Dyer 46. Rastall 128, 129. the privilege of Chester follows the persons of the inhabitants, and so there can be no failer of justice as is objected. And for the traverse, though it be ill, it shall do no hurt in this case to take away the custom, for upon the entire record, it doth appear that the Action lyes within the jurisdiction, and if Judgement be given here, it is coram non judice, and so the traverse is not material, 9 H. 7. 12. 37 H. 6. f. 26. Cooks Mag. Char. cap. 24 7 Mag. Char. f. 241. Westm. 1. C. 35. Bract. 260. Hill. 7 Iac. Dymocks case in this Court. Nicholas Iustice answered, the Justices of this Court are not bound to take notice of the custom of Chester, otherwise than as it is alleged. Roll chief Iustice, The matter is whether we can take notice of your case, otherwise than you

Tryall. Not ce.

have pleaded it, and your plea is naught, and the party may demurr upon it, for it appears not whether the custom extends to Wellington where the trover was, because it appears not whether Wellington lie within the County Palatine of Chester or no, and the Plea cannot be good in part, and ill in other part, as is supposed. Jerman Justice, The Declaration here is good, and if the plea be not good to answer it then it is ill. Nicholas Justice, The Plea is contrary to law and reason, and Common sence, and there ought not to be a faller of Justice. Ask of the same mind. Roll chief Justice, We must take all the matter as it is pleaded, and if the Plea be ill, the other party shall not be said to confess any thing. And here you have pleaded a plea in Bar, viz. Not guilty, and you have also Pleaded to the jurisdiction of this Court, which cannot be; and we are not now to examine the jurisdiction, but the pleading. Therefore, shew cause Monday next why you shall not plead in Chief.

Plea.

Confession.

Griffith against Thomas.

Trin. 1652, Banc sup.

Mich. 1651. rot. 340.

Error to reverse a judgement in debt in the C. B.

A Writ of Error was brought to reverse a Judgement given in the Common Pleas in an Action of Debt upon an Obligation to stand to an Award, and the Errors assigned were, 1. That whereas the Award was to pay a certain sum of money, at or before the 25 day of December, the breach assigned is, that he paid it not at the 25 day. 2ly. Whereas there are 2 parties of one side, and one on the other side that submitted to the Award, The Award is that one party shall not prosecute the other. 3ly. The Condition is that the Award shall be made the 20 day of such a month, and it is set forth that the Award was made before the 20 day, and doth not say what day it was made; But the Counsel relyed upon the 1 Exception; And to that Latch on the other side answered, That if it be paid before the 25 day, it is then payed at the 25 day. 2ly. The Condition requires the award to be made under their hands, and the subsequent averment is to no purpose. And as to the 3. Alter partium extends to all parties, and besides, the breach is not assigned upon that. Roll chief Justice, If it be paid before the day, it is paid at the day, and so that is certain enough. 9 H. 7. Another exception was taken, that the condition was that the Arbitrement should be put in writing by the Arbitrators, and it is not so here expressed, but only generally that it was put in writing. Roll chief Just. It is not to be necessarily understood that it must be put in writing by the Arbitrators themselves, Another Exception was taken that here is an Outlawry after judgement, & there is a fault in the Outlawry, for in the Writ to the Sheriff it is præcipipimus vobis, instead of præcipimus vobis, & the year of our Lord is in Figures. And 2ly. it is secundum consuetudinem regni Angliæ. whereas it was in the time of the Keepers of the Liberty of England. Roll chief Justice, If the word be præcipipimus, then there is no command to the Sheriff, for that word signifies nothing, Therefore let the Outlawry be reversed, and judgement affirmed.

Award.

Trin.

Trin. 1652. Banc. ſup.

IN an Action upon the Caſe, the Plaintif declared, that in ſuch a High-way the Defendant digged a hole, and that by reaſon of that hole, as he was travelling in the way with his Gelding, his Gelding did fall and hurt himſelf, to his damage, &c. Upon not guilty pleaded, and iſſue joyned at the Tryal, this evidence was given to the jury, namely, That the Plaintifs Servant was driving his Maſters Gelding in the way, being loaden with Lead, and that by reaſon of the hole he fell, &c. To this evidence it was demurred, and for cauſe it was ſhewed, That by the evidence it neither is proved that there was ſuch a way, nor what perſon digged the hole, both which are part of the iſſue to be tryed, and ſo the evidence proves it not, and therefore is not good to find the Verdict for the Plaintif, as the Jury have done. Roll chief Juſtice, This evidence is no more than a ſpecial Verdict, and it ought to find the way and the hole digged, and all the matter conducing to the iſſue, and therefore it is not good as it is, Therefore let the Verdict be quaſhed, and a new Venire awarded. Demurrer to an evidence. Verdict. Venire.

Heard againſt Read

Trin. 1652. Banc. ſup.

IN an Action upon the Caſe for words, the Caſe was this, the Defendant being brought before a Juſtice of Peace to anſwer a crime objected againſt him, the Plaintif appeared as a witneſs to teſtifie againſt him, whereupon the Defendant to weaken his Teſtimony did ſpeak theſe words of the Plaintif before the Juſtice of Peace, Thou haſt been a contentious man this 30 years, and a Breeder of ſtrife, and haſt taken a falſe Oath againſt my Brother and Siſter in a matter of incontinency, and haſt taken 20 s. for it, and I will ſhew it upon Record. Upon not guilty pleaded, and a Verdict for the Plaintif, It was moved in Arreſt of Judgement, that the words were not actionable, becauſe it is not ſaid that he is perjured in any Court of Record, but, that he will ſhew it upon Record, And 15 Car. Morton and Clapams caſe was cited; but on the other ſide it was ſaid, that take all the words together they are actionable, and Trin. 22 Car. Osborn and Brookes caſe was cited. Roll chief Juſtice, The words are ſaid to be ſpoken falſo & malitioſe, and it is not ſaid in the Record that the party ſpoke them in his own defence, and it may be they were ſpoken by the by, and not in the judicial proceedings, but it appeared upon reading of the Record, that they were ſpoken to diſable the Plaintifs teſtimony: Whereupon Roll chief Juſtice ſaid, That the Action did as well lie in this caſe, as it doth lie for endicting one falſo et malitioſe, for Endictments are more favoured in the Law than private matters between parties. Therefore let the Plaintif have his Judgement, niſi. Arreſt of judgement in an Action for words. Caſe.

Cuſto-

Cuſtodes againſt Howell Gwinn.

Trin. 1652. Banc. ſup.

Arreſt of Judgment in an Endictment for perjury.

HOwell Gwinn was endicted of perjury, for taking of a falſe Oath in an Affidavit made before a Maſter of the Chancery, and was found guilty. It was moved in Arreſt of Judgement, 1. That it doth not appear by the Record that the Oath made was any thing material to the ſute depending in that Court, and ſo it is but an extrajudicial Oath, and is not perjury either by the Common Law, or by the Statute. 2ly. It doth not appear that the party took a falſe Oath, for it appears not whether the Maſter of the Chancery had any power to take this Oath, and if he had not, then it cannot be perjury. Latch enforced the 2 Exception, and ſaid, That a Maſter of the Chancery hath not power ex Officio to take an Oath, and therefore the party ought to ſhew that he had power to take this Oath; but if he hath power he ought not to take it upon the holy Evangeliſts, as it is here expreſſed, but it ought to be upon the holy Evangely, for the form is ſuper ſacro ſancto Evangelio, and not Evangeliſtis. Maynard on the other ſide prayed judgement, and that the party may be fined, and anſwered, that it doth well appear that the Oath was made touching the cauſe in queſtion, and the Endictment is here laid at the Common Law, and not upon the Statute. Nor it is not neceſſary to ſhew that a Maſter of the Chancery hath authority to take an Oath, for it is the common courſe and practice of the Court of Chancery for the Maſters to take oaths, and the Chancery being a Court of Record here, this Court is bound to take notice of the Cuſtoms uſed in it. 3ly. The taking of the Oath upon the Holy Evangeliſts, and the taking of it upon the Holy Evangely is all one in effect. Roll chief Juſtice, The moſt material Exception is, whether a Maſter of the Chancery hath authority ex Officio to take an Oath, and certainly antiently he had not, and therefore you ſhould have expreſſed that he had authority to take an Oath. At another day Hales ſaid, that it doth well appear by the Record, that the Maſter had authority to take the Oath of the perſon, and many preſidents are, as our Caſe is. Roll chief Juſtice, The Preſidents are, that he hath authority to take an Oath prout per Recordum, &c. but it is not ſo expreſſed here. Nicholas Juſtice, A Maſter of the Chancery of common right hath no power to take an Oath, and therefore in this Caſe you ſhould have pleaded preciſely that he had authority, otherwiſe it cannot be good. Hales at another day anſwered another Exception taken, that it did not appear that the Affidavit in which the falſe Oath was made, was filed, and then it was not upon Record, and ſo could be no perjury, and ſaid it is all one whether the Affidavit be filed or not, for the forſwearing is before the filing, & the party who takes the oath may chooſe whether he will file it or no, and therefore it is not neceſſary in the pleading to ſay, as it appears by the Record. Green on the ſame ſide, It may be that it was filed, and afterwards taken off from the file, and then he cannot ſay as it appears by the Record, and it would be miſchievous if the party ſhould not be puniſh d for the perjury, becauſe the Affidavit was not filed. Serjeant Glyn on the other ſide ſaid, that the Preſidents which are ſhewn to prove that a Maſter of the Chancery may take an Oath, are, that the party hath made an Affidavit, as it appears by the Record, and this is not ſo pleaded here, and therefore the Preſidents make for us. An Endictment cannot be at the Common Law for perjury in an Affidavit, if it be not filed, for the filing of it makes it a ground to frame the Endict-

Oath.

Filing.

ment

ment upon, and so is it in other Courts, for the filing of it gives power to the Court to make rules, and orders upon it. Wild on the same side said, that it appears not here positively, that the Affidavit was made in this cause alleged, but only by way of argument, which is not good. Roll chief Iustice, If it be in the same busineſſe, it shall be intended to be between the same parties: Perjury at the Common Law is intended to be in some Court, and legal proceedings, for of a false oath made before us not touching the matter in question between the parties, an endictment of perjury lies not, and it appears not here, that the Chancery took notice of this Affidavit, for nothing was done upon it, and the words as it appears by the Record are material words, and do make up the busineſſe, but they are here omitted. If one make a false oath, the party is punishable for it by an action upon the case, in case it be not perjury, for which he may be endicted for it. A false oath is one thing, and perjury is another thing, for one is judicial, and the other is extrajudicial. And the Law inflicts greater punishment, for a false oath made in a Court of justice, than if it be made elſe-where, because of the preservation of justice. Ierman Iustice said, that perjury takes its name from perverting of justice, and therefore it is intended to be in a Court of justice. The Court held the endictment ill, and gave Iudgement against the Custodes. Postea,

Perjury. Endictment. Case. False Oath.

Trin. 1652. Banc. sup.

Upon a return of the Coroner of an enquest found before him, that one had killed another man with a gun by misadventure, The question was whether the party might plead the general pardon. Thereupon Roll chief Iustice said, if one kill another by doing an act which was needleſs for him to do, it is manslaughter, and so was it adjudged in Sir John Chichesters case lately, who killed his man by misadventure in fencing with him; but if he kill another in doing an act which belongs to his calling, it is not manslaughter, therefore men must beare not to do things, which concern them not to do. And therefore this Act is not within the generall pardon; but he must purchase his pardon.

Whether one might plead the general pardon. Manslaughter Pardon.

Williamson against Norwitch.

Trin. 1652. Banc. sup.

Hill. 1651. rot. 1668.

I. S was indebted to Williamson the Plaintiff by a contract, and to Norwitch the Defendant upon an obligation, and dyes intestate, Norwitch intermedles with the goods, Williamson brings an Action of debt against him as Executor of his own wrong, Norwitch takes letters of administration of the Goods, and Chatels of I. S. and then pleads that I. S. was indebted unto him by Obligation, in the sum of 50 l. and that he had taken out letters of administration of the Goods and Chatels of I. S. and by virtue thereof doth retain Goods and Chatels of I. S. to the value of the said debt, and besides those hath nulla bona, &c. To this plea the Plaintiff demurred, and the question here was whether the Executor of his own wrong, afterwards taking out letters of administration pendente lite, may retain the goods of the intestate, to satisfie his own debt due upon Bond, or ought to satisfie the Plaintiffs debt due by contract. It was urged that he could not plead this plea, and these books were cited, 5. rep. Cowlers case,

Demurrer to a plea in debt against an Executor de son tort demesn.

and 21 H. 6. f. 8. and 38 Ed. 3. f. 17. and it was said that this case is stronger, because the administration was taken pendente lite, 5. rep. Midletons case, 2 E. 4. 7. Latch on the other side held the plea good, and agreed Cowlters case 5. rep. and that the taking of letters of administration shall not destroy the Plaintiffs writ; but here is a legall administrator, and he might have retayned the goods if he had been Debtor but in equal degree with the other: but he is a Debtor of a higher nature than the other, for his debt is by Bond, and the others but by contract, and the law requires his debt to be first satisfied, 2 H. 4. 21. Coment. 545. If he have more goods than will satisfie himself, he ought to make election what goods he will have, and alter the property; but where there are not more goods, it is not necessary to do it. And the law should do wrong, if he should not be first satisfied, for now he is a lawfull administrator, and also a creditor of a higher nature than the other, and because he cannot bring an Action against himself for his debt, therefore he may by law retain the goods in satisfaction. And he may satisfie a debt upon a specialty, before a debt due upon a contract, although a sute were commenced for the debt due upon the contract, so here he may retain the goods. Roll chief Iustice, Why shall not here the administration purge the wrong which he did as Executor of his own wrong? It is true indeed that he shall not abate the writ, by taking letters of administration; but he may plead this plea in bar of the Action, and here it doth not appear but he is rightly Executor, without doubt the plea here pleaded, had been good to a stranger without letters of administration, and the law shall supply the retainer to him here, and there is no wrong to the Defendant; at another day it was moved again, and the Court held the plea good, and ordered Iudgement for the Defendant; nisi.

Abatement. Bar.

Strode against Homes.

Trin. 1652. Banc. sup.

Hill. 1651. rot. 999.

Arrest of Iudgment in an Action for words.

STrode brought an Action upon the case against Homes, for speaking of these words of him in relation of his office, he then being Churchwarden of St. Clements Parish in Oxford; Thou art a cheating knave, and hast cosened the Parish of 40 l. Upon not guilty pleaded, and a verdict for the Plaintiff. It was moved in arrest of Iudgment, that the words were not actionable, because here was no special losse alleged by the Plaintiff, nor is he in any danger of corporal punishment, by speaking of the words, Pasc. 10. Iac. Hopper and Baker. Roll chief Iustice answered, the matter is not so much the losse of his office, as the losse of his credit in being accompted a cheater. At another day Crook Senior moved for Iudgement for the Plaintiff, and said the words are actionable, for a Church-warden is not meerly a spiritual officer, but an officer by the Common Law, and also by the Statute, Yarly and Ellis case, Sir Miles Fleetwoods case, Hob. rep. Bray and Haynes. Crook Iunior on the other side urged that this is not an office of profit, but of trouble and burden, and no special losse is alleged. Roll chief Iustice. Officers which have no benefit by their offices have more need to be repaired, if they be scandalised in their Execution of them, and here the scandal is great losse, to an honest man, and what other remedy can he have to repair himself, but by his Action on the case? Ierman Nicholas and Ask of the same opinion. And so Iudgement was given for the Plaintiff, nisi.

Case

Trin.

Trin. 1652. Banc. sup.

VPon an Affidavit read in Court made by divers prisoners in the upper Bench-prison against Colonel Keyes a prisoner, that he is very unruly, abuseth his fellow prisoners, it was moved he might be removed to Newgate; But Roll chief Iustice answered, if he be unruly, the Gaoler must put on irons upon him, and keep him safely there, for this is no cause for us to remove him, for he lyes there under many actions, and we must not remove him to another prison.

Motion to remove a prisoner out of the upper Bench prison to Newgate denyed.

Trin. 1652. Banc. sup.

THe Court was moved that the party might not have a tryal at the Bar untill he had paid costs upon being nonsute in a former action for the same lands. Roll chief Iustice, He shall not proceed to another tryal, untill he have paid his costs, for by this means we shall incourage men to be vexatious.

Against a trial at the Bar till costs paid upon a former nonsute. Costs.

Freind against Baker.

[Trin. 1652. Banc. sup.

WIld moved to amend a Record wherein a Iudgement was given in the Common Pleas, after the Record was removed by a writ of Error into the Chequer Chamber, the fault to be amended was, that there is day given over to the parties from Easter Term to Michaelmas Term, and so Trinity Term is left out, which he conceived was but a misprision of the Clark, and but a miscontinuance in giving a wrong day to the parties, 2 H. 7. 11. 22 E. 4. 3. But Roll chief Iustice answered, that this is the act of the Court, and by your reason you may skip over 3 or 4 Terms one after another, without any continuance. The giving of a day more than is necessary, is no discontinuance, but here wants a day, which makes it not a miscontinuance, but a discontinuance, and so was it adjudged, 1 Car. at Reading Term. Nicholas Iustice cited 21 H. 6. f. 16. to be adjudged that it is a discontinuance. Roll chief Iustice, A miscontinuance is where one processe is used for another, and so the processe is mistaken; but this is a discontinuance, and cannot be amended. For this is not upon a writ of Error out of the Common pleas as we supposed it to be, and that the Record had been amended there, for then we would have advised whether we would amend it here; but it is upon a writ of Error brought in the Chequer Chamber upon a Iudgement given here.

For amendment of a record denyed.

Discontinuance.

Amendment.

Miscontinuance.

Brock against Vernon.

Trin. 1652. Banc sup.

BRock brought an action of Debt against Vernon as an Executor upon a bond entred into by Vernon unto the Testator of the Plaintiff, the Defendant acknowledgeth the bond, but sayes that he gave another bond in satisfaction of that Bond unto the Testator, which the Testator did

Arrest of judgement in debt upon a Bond.

Plea. Thing in Action.

accept of in satisfaction. The Court held this plea ill, and that the party might have demurred upon it, and needed not to have joyned issue, and put it to the Jury, for it is no good plea to say, that one did accept of one thing in Action, in satisfaction of another thing in Action, and here the Defendant hath confessed the debt, and therefore his plea being ill, Judgement ought to be against him, and Iudgement at another day was given accordingly.

Buckstone against Shulock.

Mich. 1652. Banc. sup.

Entred Trin. 1652. rot. 177.

Error to reverse a judgment in the Common Pleas upon an information for selling of Wine without licence.

A Writ of Error was brought to reverse a Judgment given in the Common Pleas upon an information, for selling of Wine without licence, contrary to the Statute. The Error assigned was, that the information was brought in the Court of the Common Pleas, which is in the County of Middlesex, whereas the offence is alleged to be done at Lambeth in the County of Surry, which ought not to be, as Davisons case is in Hob. rep. Roll chief Iustice, How do you prove this to be within the Statute of 7 Ed. 6. If the Statute give liberty to Justices of peace, and Oyer and Terminer, or Justices of assise to enquire of this offence, then an information cannot be preferred in a County where the offence was not done, and the meaning of the Statute, 21 Iac. is not to put the party without remedy, and if he cannot sue by the Statute of 7 Ed. 6. in the County where the offence was committed, then this Statute of 21 Iac. bars him not to prefer an information in another County. Latch of Councel against the enformer said, that by the Statute of 7 Ed. 6. an information lyes before Justices of Peace, or Assise, or Gaol delivery. Roll chief Iustice, I deny that by the Statute of 7 Ed. 6. the information could not have been brought in any other place, but in the Courts at Westminster, and therefore that it is not necessary to bring it in the County where the fact is done, notwithstanding the Statute of 21 Iac. & it is reason it should be so, because that no jurisdiction is given by the Stat. of 21. Iac. to Justices where they had no power before. And the Court of Record expressed in the Stat. of 7 Ed. 6. shall be intended one of the Courts at Westminster, and not a Court of Record elsewhere. Therefore shew cause why the Iudgement shall not be affirmed.

Tench and Hubrison.

Mich. 1652. Banc. sup.

The Court of the Admiralty cannot proceed criminally.

In the Case of Tench and Hubrison upon a motion for a prohibition to the Court of Admiralty, It was held by the Court, that the Court of Admiralty cannot proceed criminally against one that is in contempt to the Court. Yet the Court said, they would here the Civilians if they would speak in it Saturday following.

Cydall

Cydall and Spencer and others.

Mich. 1652. Banc. sup.

IN the Tryal between Cydall and Spencer and others, in an Ejectione firmæ it was said by the Court, That if one do disseise me of part of a house, and I am in possession of the rest of it, It is at my election whether I will admit my self out of possession of the house or not. Where one may have Election.

Long and Hebb and others.

Mich. 1652. Banc. sup.

2. Rol. ab. 399. a. l.

IN a Tryal between Long and Hebb and others, it was said by Roll chief Iustice, that Letters of Administration do relate to the time of the death of the Intestate, and not to the time of granting of them, and therefore an Administrator may bring an Action of Trespass or a Trover and Conversion for goods of the Intestate taken by one before the Letters granted unto him, otherwise there would be no remedy for this wrong done. To what time Letters of administration shall relate. Relation. Trespass. Trover.

Mich. 1652 Banc. sup.

THe Court was moved to change the Venue in an Action brought for an escape: But Roll chief Iustice said, it ought not to to be changed, for an escape is not local but transitory, for an escape in one place is an escape in all places. Where the Venue may not be changed.

Sidenham.

Mich. 1652. Banc. sup.

IN the Case of one Sidenham Roll chief Iustice said, It had been a question, Whether if one plead payment at a day, he shall be admitted afterwards to plead another plea. Where one may vary from his plea.

Watts and Lowth.

Mich. 1652. Banc. sup.

AN Action upon the Case was brought upon divers Assumpsits, and a Verdict given for the Plaintif. It was moved in Arrest of judgement that the Jury had given more damages than were laid in the Declaration, whereas it was but a mis-calling in the quæ in toto attingunt. Roll chief Iustice said, That the mis-calling is nothing if the damages given by the Jury be not more than the Plaintif hath laid in his Declaration. And therefore let him have his judgement. Arrest of Iudgement in an Action upon an Assumpsit. Verdict.

Gough and Cann.

Mich. 1652. Banc. sp.

Arrest of judgement in an Action for a Rescous.

IN an Action brought for a Rescous, and a Verdict found for the Plaintif, these Exception were offered in Arrest of Judgement, 1. whereas he speaks of the next Court, he doth not shew where that next Court was held. 2. The time of the Arrest is not shewed, upon which the Rescous is supposed to be made. 3. It is not shewed that the party rescowed was in custody of the Serjeant from whom he was rescowed. 4. It is not shewed before whom the Plaint was, upon which the Arrest was made. 5. The venire is ill awarded, for it is to the Coroners, where it ought to be to the other Sheriff, if one be a kin to the party, and Latch offered this Exception, that the Declaration sounds in Trespass, which Action doth not here lie for the party. But to that Roll chief Iustice answered, that it is in the election of the party to have an action upon the Case, or an Action of Trespass; for an Action of the Case or an Action of Trespass lies at the election of the party against one for taking away his Wife. And he demanded whether the two Sheriffs of Bristow where the Rescous was brought were not one Sheriff, and whether the venire was not helped by the Statute And it does also appear that the party was in custody by vertue of the Process, and it is now after a Verdict: And he said, that if one rescue the party who is arrested at my sute, because that after the party is arrested I have an interest in the body of the party, this Rescous is a Trespass to me, for which I may well maintain an Action of Trespass. And Ierman Iustice said, that the body of the party arrested for debt is a pledge for the debt it self. Iudgement was given for the Plaintif.

El. Action. Trespass. Case.

Rescous.

Pledge.

Liniston and Maurice.

Mich. 1652. Banc. sup.

Arrest of Iudgement in an Action of Trespass for not carrying away tithes.

THe Case was this, An Action of Trespass was brought against a Parson for not carrying away his Tithes in due time. The Defendant pleads that the Plaintiff gave him no notice to fetch away his Tithes; the Plaintif replies, that he did give him notice, but doth not shew where he gave him notice, and upon this Exception judgement was staied: Afterwards Baldwin of the Inner Temple moved for judgement, and alleged that the not alleging the place was no Error. Nicholas Iustice, what say you to Durdens Case? Roll chief Iustice, There are many cases where the place is not materal, yet it must be alleged for the Venue. If Debt be brought against an Executor, and he plead fully administred; if the Plaintiff reply that he hath assets, he ought to allege the place where he hath assets: And I conceive that there ought to be a place alleged here, that a Jury who are nearest the place, and so may have the best knowledge of the matter, may try it, although it may be tryed in another place: but if the tryal be ill the Verdict will not help it, but there must be a new tryal, Therefore it were good to replead as to the place.

Place.

Repleader.

Mich.

Mich. 1652. Banc. sup.

ONe took out a Latitat out of this Court and arrests the party, and refuseth to take Bail of him, but carryed him into another liberty to charge him with an Action there; Upon this the Court was moved for an Attachment, for abusing the proceese of this Court, And it was granted, nisi, &c. Attachment for abusing the proceese of the Court.

Mich. 1652. Banc. sup.

IN a tryal at the Bar between Cheesman and Turner and others in Trespass and Ejectment, Roll chief Iustice said, That if there be divers Executors of one Will, and one of them refuse to prove the Will, he may plead ne unques Executor. And that a Will in writing may be revoked by parol, and revived again by parol. Where ne unques Executor is a good Plea. Revocation. Reviver.

Theoball and Conquest.

Mich. 1652. Banc. sup.

Trin. 1652. rot. 1999.

AFter a Verdict in an Action of Trespass and Ejectment it was moved in Arrest of judgement, that the Lease was altered after pleading. On the other side it was moved for judgement. 1. Because the Lease was only amended in matter of form, and not in substance. 2ly. Because by the rule of Court the Defendant is to confesse the Lease, and so it is not material whether the Lease be good or no. But Roll chief Iustice answered, that the Lease was amended in matter of substance, and if the Lease be defective we can give no judgement, and by your own shewing it is not good, and the rule of the Court doth not bind the Defendant to confesse the Lease otherwise than you have made it, and therefore let the judgement be stayed. Arrest of Iudgement in Trespass and Ejectment. Amendment. Iudgement. Confession.

Fowke and Boyle.

Mich 1652. Banc. sup.

Trin. 1652. rot. 460.

THe Plaintif brought an Action upon the Case for selling unto him false Bills of publique faith to the value of 800 l. knowing them to be false, with an intent to deceive him: The Defendant demurs upon the Declaration, And Babington of the Inner Temple offered these Exceptions to it. 1. That the Ordinance of Parliament for the bringing in of money & plate into Guildhall, and giving the Commissioners authority to give these bills to them that brought it in for re-payment thereof with interest at 8 l. per centum, per annum, was mis-recited; for it is said that the Ordinance was made by both Houses of Parliament, whereas it should be by the Lords and Commons in Parliament, for the Houses are the places where they sit, and can make no Ordinances, and he cited Mich. 13 Car. Tydalls case. Demurrer to a Declaration in Action upon the case.

case. 2. The Aldermen that are the Commissioners are not called by their Christian names, as they ought to be, but only by their Sirnames. 3ly. It is not shewed in what manner the Bills were assigned to him, but he says only that they were assigned in due form of Law, which is too generally expressed, and to this he cited Mich. 10 Iac. Banc. Reg. Glas and Gowes case. To these Latch answered, That the mentioning of the Ordinance of Parliament; and of the Aldermen, is but by way of inducement to the Action, and nothing to the ground of it, and therefore there need not be so punctual a recital as is surmised, neither is it necessary to shew how the Bills were assigned, and they are the Defendants own words, nor is it material how the money was to be paid. Roll chief Iustice, The ground of the Action is the deceit in assigning over false Bills, and affirming them to be true, and the other matters are meerly matters of inducement, and used only by way of recital, and not material to the Action. And you have confessed the deceit for which the Action is brought by your general demurrer upon the Declaration. And therefore let judgement be for the Plaintif except better matter be shewn. Postea.

Inditement. Confession.

Wood against Holland.

Mich. 1652. Banc. sup.

Trin. 1652. rot. 1061.

Demurrer to a Replication in Trespass and Ejectment.

WOod brought an Action of Trespass and Ejectment against Holland, The Defendant pleads that the Plaintif did disseise I. S. of the Land, and then made a lease of it to him, and that afterwards the land did descend to the Plaintiff, The Plaintiff replyes that he was seised of the lands, and traversed the disseisin supposed to be made to I. S. And to this the Defendant demurs, and for cause shews that he ought to have traversed the descent, and not the disseisin. But Roll chief Iustice said, That the traversing of the disseisin makes an end of all, and therefore is well taken, as being the most material matter, although that the descent might have well enough been traversed. And therefore let the Plaintif have Iudgement, nisi.

Traverse. Seisin. Descent.

Reckwitch and Moyle.

Mich. 1652. Banc. sup.

Trin. 1650. rot. 503.

A writ of Error to reverse a judgement given in an inferiour Court.

A Writ of Error was brought to reverse a judgement given in an Inferiour Court. and the Writ of Error was to remove a Record, quod coram vobis residet de placito in Curia manerii de Cuttingbye, whereas the Record was, de placito in Curia Custodum libertatis Angliæ auctoritate Parliamenti de Cuttingbye. And therefore against the writ of Error it was objected, that there was a variance between the writ of Error and the Record, and therefore that the writ of Error was not good; But against this was cited Lodge and Goodales Case in this Court 23 Car. that it is not necessary to recite in a writ of Error all the words of the description of a Court, and here the writ is not to remove a Record out of an inferiour Court, but the writ of Error is to reverse a judgement in a Record, quod coram vobis residet. Hales answered, That here is a right description

tion of the Court, in regard of the place where it was held, and of the Judge of it, but not in regard of the Lord of it, and therefore he conceived it a material objection, because a part of the stile of the Court is mistaken, & not only an additional description of it. Roll chief Iustice answered, If it be but an additional addition or description, it is well enough as it is; but we will see what hath been done in like Cases heretofore; but me thinks that it shall be intended here to be Curia Custodum libertatis Angl. for here it is in a Writ of Error which will not lie if it be not a Court of Record. But Nicholas and Ask Iustices said, It cannot be intended a Court of Record, but a Court Baron, and so the stile implies common intendment. The Court advised till the next Term. This Case was afterwards moved by Latch, who said, That here is no variance between the Writ and the Record, although the Writ be not so full as it might have been to describe the Record, and it is agreeable to the antient and usual practice at this day, and cited the old book of Entryes 171. and said, that in Paytons case the Record was in Curia Domini Regis Civitatis, and the writ of Error was in Curia Civitatis Glocestriæ, Mich. 23 Car. Banc. Reg. fol. 569. and all Courts of Record are originally the Kings. Hales on the other side said, that the writ of Error ought to shew whose the Court is, and the rather, because it is said to be Curia Manerii. Wadham Windham, The Register is both ways, and by direction of Parliament the Common Pleas is stiled Curia de Communi Banco. But here the Record appears to be Custodum, &c. Civitatis, and the Writ doth not mention that. The Court would advise o the Presidents. This case was again moved, and Lodge and Woodhalls case, 22 Car. urged, that the Return of the Certiorari upon the writ of Error was not good for the variance formerly alleged, but Wadham Windham held it good enough, and relyed upon Presidents shewed to Hern the Secondary, as the Court had directed. Hales on the other side urged that the variance made it not good, for it cannot be intended the same Court. Roll chief Iustice, here is no direct opposition between them, for they may both stand together, and the writ of Error intends it to be a Court of Record, and yet it is the Court of the Manor also, and therefore it is good in substance, De facto it is the Court of the Lord of the Manor, but virtually and in dignity it is the Court of the King; but the Venire is clearly vitious, and therefore let the Iudgement be reversed for that cause. Variance.

Jervis and Lucas.

Mich. 1652. Banc. sup.

THe Court was moved for one Iervis, that the Court might view his wound, and increase the damages given him by the Jury, because they had given him but twelve pence damages for his wounding, whereas the parties Arm was broken, and he was in great danger still to lose the use of it. But Roll chief Iustice answered, it appears not by his Declaration what manner of wounding it was he received, as it ought to have been, and how can we know how he was wounded? But we will advise, and hear Councel on both sides. At another day Serjeant Parker moved the same matter again, and cited 3 H. 4. f. 4. and 18 H. 4. f. 23. and Dyer, to prove the Court might increase the damages. Twisden answered, That the wounding ought to have been particularly expressed in the Declaration, that the Court might judge of it by the Record, and the party is not to Motion for the Court to view a wound to encrease damages.

be viewed by the Court upon the bare averment of the party made at the Bar. To which Roll chief Iustice agreed, and said, how can it appear to us that he was wounded so as you aver by this Battery? for it may be he was wounded since your action, neither can you now discontinue the Action, because it is after a verdict, so that you are now without remedy.

View.

Discontinuance.

Mich. 1652. Banc. sup.

Motion for a Prohibition to the Prerogative Court.

THe Court was moved for a prohibition to the Prerogative Court, because they do proceed to examine witnesses there, to disprove a will that was proved there 20 years since, by which Will lands were devised, and the lands are sold, and this they do to prevent a tryal at Law touching the title of the land directed out of the Chancery. Roll chief Iustice answered, they may examine the probate there; for you have libelled there to take benefit of the probate, and therefore the other party may disprove the probate if he can, as far as concerns any goods devised by the will, And therefore we will grant no prohibition.

Mich. 1652. Banc. sup.

Motion to make Scavengers execute their Office. By-laws. Mandamus.

THe Court was moved for the Parishioners and Officers of the Parish of Clarkenwell, to make Scavengers that are elected in that Parish to serve the Office. Roll chief Iustice answered, It is marvel that the City of London do not look to this, for they have power by their by-laws to make men serve such offices, yet take a mandamus for them to be brought hither to shew cause why they will not execute the Office.

Acton and Ayres.

Mich. 1652. Banc. sup.

Error to reverse a judgement in the Common Pleas in an Ejectione firmæ. Iudgement.

A Writ of Error was brought to reverse a judgement given in the Common Pleas in an Ejectione firmæ, and the Error assigned was, that the judgement was quod querens recuperet, & the words quod defendens capiatur are omitted. And upon this Exception the Court reversed the judgement, for they said in this judgement thus entred there is no return of damages, nor a Capiatur, and so the Common-wealth is cozened of the fine, and the Defendant barred from bringing his writ of Error.

Dawkes and Coveneigh.

Mich. 1652. Banc. sup.

Hill. 1650. rot. 653.

Special Verdict in an Action of Trespasse quare clausum fregit.

COveneigh was endicted for felony for breaking the house, and taking 250 l. out of the house of Dawkes, and found guilty, and was burnt in the hand, afterwards Dawkes brings an Action of Trespasse quare clausum fregit, and for carrying away the 250 l. against Coveneigh, who pleads not guilty, and thereupon a special verdict was found to this effect; that the Defendant did feloniously break the house, and carry away the 250 l. and was endicted for it, and was found guilty, and burnt in the hand for it, and

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if upon the whole matter, &c. The question upon the special verdict was, If after the Defendant was endicted and found guilty, and burnt in the hand, for this fact at the sute of the keepers of the libertyes of England, an Action of Trespasse quare clausum fregit, and for carrying away the mony, be maintainable by the party, who was thus robbed against the party or no. Latch of Councel with the Plaintiff held, that the Action did well lye, and that the Plaintiff ought to have Judgement, and that this special matter found by the Jury, is no bar to the Action, for if he had been attainted for another Felony, it would not have barred the Plaintiff from his Action, after he had been discharged; but otherwise it is if the party bring his Action, whilst the party stands attainted, or the party be attainted, pending the Action of Trespasse, 33 Eliz. Wade and Prescots case in this Court, and 34 Eliz. Trussels case in this Court, and 6 Ed. 4. 4. and in our case the Action was not brought till after the party tryed; But it is objected, that the Trespasse here is brought for the same fact for which the party was tryed, and therefore it is unreasonable that they should be doubly punished for it. To this I answer, that it was at the parties election at the beginning either to endict him, or to bring his Action of Trespasse, Hudsons case, 4. rep. 43. And here the party hath made no election, for the party was endicted at the sute of the Common Wealth, and not at the prosecution of the party, and so he hath made no election untill now. And if the Action might not be brought, it might prove verry mischievous, for the party might get himself endicted, and so cousen him that is robbed of this mony, Dyer 50. 8. rep. 13. And the highness of the nature of the endictment doth not drown the Action of Trespasse, although that treason doth drown Felony, 1 R. 3. 1. 6 H. 7. 5. And although the monies here stollen be forfeited to the State, by the conviction of the Felony, yet an Action of Trespass lyes against the Felon to cause him to render damages pro tanto, although he cannot recover the mony in specie. And the special verdict doth not find, that any evidence was given for the Plaintiff upon an endictment, but only for the State. And for authority he cited Markham and Cobs case, Hain. 2 Car. Entred 1. Car. rot. 112. Roll chief Iustice said, That Iustice Doderidg, and Iustice Whitlock held, that the Trespass lyes; But Iustice Iones held the contrary, because if the party robbed might have his election, either to endict the Felon, or to bring his Action of Trespass, many Felonies would be smothered, and this would prove very dangerous, and though the party robbed had endicted the Felon he might have had his goods, or he might have brought an appeal against him, and so there is no inconvenience to him, 4 Iac. In Higgins case it was adjudged where an Action of Trespass was brought by the Husband for beating his wife, by reason whereof she dyed, that the Action did not lye, because it was Felony. Ierman Iustice differed from Roll chief Iustice, and said, that the inconvenience on the other side would be greater than is alleged, if the Felon shall so take advantage of his one wrong, and in 2 Car. it was held that the Action doth lye. Roll chief Iustice said, if the Felon have not wasted the goods, when he is hanged the party shall have restitution; but if he have wasted them, and hath other goods he shall have restitution in value. But let Wild argue it again the next Term. Accordingly it was again spoken too by Wild, who argued that the Action of Trespass did not lye, first because the party did not make fresh sute after the Felon, according to the Statute, 21 H. 8. which was made to encourage the prosecutor; but the party hath not prosecuted here, and it is all one to recover damages for the goods, and to recover the goods themselves, so that I conceive that is no difference. And the great inconvenience which might come to the Common Wealth if the Action should lye, doth countervail the damage that may accrew to the party,

Trespasse.

Restitution.

if the Action lye not, And it matters not that it is said the Trespass is a distinct offence from the Felony, for it is drowned in the Felony, and therefore the party can have no satisfaction for it, Mich. 21 Iac. Ayers and Higgins case, C.B. 31 H 6. Br. 15. tresspasse 415. 4. Iac. Higgins and Butchers case, B. R. Roll chief Iustice, This is after a conviction, and so here is no fear that the Felon shall not be tryed; But if it were before conviction the Action would not lye, for the danger the Felon might not be tryed. And there is no inconvenience if the Action do lye, and since he could not have had his remedy before, he shall not now lose it, and now there is no danger of compounding; for the wrong the rest of the Iudges agreed with Roll, and so Iudgement was given for the Plaintiff.

Ellis and Pipin.

Mich. 1652. Banc. sup.

Motion to discharge an outlawry.

THe Court was moved that an outlawry might be discharged, because it is now pardoned by the Act of oblivion, for notwithstanding it were not pardoned if it were an outlawry after Iudgment, except the monyes due, for which the party is outlawed, be payed to the party, as the book of 6 H. 7. f. 21. is, yet outlawryes before Iudgment are pardoned, and besides the parties here did submit to an arbitrement, touching the matters in difference between them, and an award is made. But the Court answered, that the outlawry cannot be discharged untill the party have brought his scire facias upon the Act, and it was also said, that the party at whose sute another is outlawed, hath an interest by the outlawry, as well as the State.

Scire fcias Interest.

Prior and Hale.

Mich. 1652. Banc. sup.

A letter of Attorney by paroll good to some intent.

A Letter of Attorney for one to appear to an Action is good enough by paroll to support a Iudgement given thereupon. By Pinsent protonotarie of the Common Pleas. Nota.

Fowke and Boyle.

Mich. 1652. Banc. sup.

Demurrer to a Declaration in an Action on the case.

FOwke brought an Action upon the case against Boyle, for selling of false bills of publique faith unto him, to the value of 800 l. the Defendant demurred to the Declaration, and took these exceptions to it. 1. That the ordinance of Parliament, upon which these bills of publique faith were grounded was misrecited, for it is said, to be made by both houses, whereas it ought to be by the Lords and Commons. 2ly. The Aldermen who were authorised by the ordinance to give these bills of publique faith, are not named by their Christian names, but only Alderman such a one, naming the surname. 3ly. There is 70 l. expressed to be paid, as is mentioned in the papers, and it is not expressed at what time or place, as it ought to have been, 16 E. 4. f. 3. and 28 H. 6. f. 3. 4ly. Here is an assignment set forth to be made in due form of Law; but doth not shew in what maner, 10. Iac. Mich. Glas and Gower in this Court. Larch on the other side said, that the mentioning of the ordinance, and of the Aldermen was but inducement to the Action, and there is no necessity to call the Aldermen by their Christian names, but as they are called in the Ordinance; nor is it necessary to

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shew how the assignment was made, and these words are the words of the party; nor is it needfull to shew how the monies were to be paid. Roll chief Iustice, The cause of the Action is the deceit in assigning the false bills and affirming them to be true, and all the other matters are but matters of inducement, and by way of recital, and not material, and you have confessed the deceit by your demurrer, and therefore let the Plaintiff have his Iudgement, nisi. Upon which rule Babington at another day moved the matter again, and urged that here was an assignment of papers mentioned, which could not be, for that it is a thing in Action, which is not assignable, nor can the Ordinance of Parliament give authority to assign a thing in Action. Roll chief Iustice, The ordinance of Parliament doth give authority to assign the papers. Latch the paper may be assigned. Green, The Action is brought for the deceit grounded upon the ordinance, and it is not necessary for the Ordinance to name the Aldermens Christian names, and these may be true bills though not subscribed, which is the deceit here alleged. Twisden on the other side said, that the acquittance is in nature of a bill, according to the intent of the Ordinance, for it is not only an acquittance of discharge, but to recover monies upon them, and so the Defendant calls them, and by the assignment the paper is assigned, and the Action is grounded on the deceit, and not upon the Statute. Iudgement was given for the Plaintiff.

Inducement.

Assignment.

Burcher and Orchard.

Mich. 1652. Banc. Sup.

Arrest of judgement in an Action on the case for words.

BUrcher brought an Action upon the Case for words, against Orchard and his wife, the Jury find that the Baron was guilty, but that the Feme was not guilty, Wadham Windham moved in arrest of Iudgement, because that the Action is joynt, and one of them is found not guilty, and said, it might have been otherwise if the Feme had been found guilty, and the Baron not guilty, and cited 9 Ed. 4. f. 51. Yard on the other side said, that the verdict hath made this exception good, and if the Defendant would have taken any advantage of it, he should have demurred to the Declaration. Roll chief Iustice denyed the difference taken by Windham, and said, if any of the Defendants spake the words and be found guilty, the Action will well lye, and it is all one here, as if the Defendants were two strangers, the Action being joynt; but the doubt is, whether it being after a verdict, this matter may be offered in arrest of Iudgement. At another day Hales moved for Iudgement and said, it was all one if any of the Defendants be found guilty, as if both of them were found so, and although it do appear by the Declaration, that the Action could not be brought joyntly against them both, because the wrongs are several, and now one is found guilty, and the other is acquitted, and damages are assessed against one only. And now the verdict hath made the Declaration good, otherwise it had been if both had been found guilty and entire damages given against both joyntly. Latch on the other side said, that the speaking of the words cannot be a joynt Act, and therefore ought not to be so laid in one Declaration, for they are severall Acts, and severall offences; as the words do proceed from them severally, and this case is not like the case of a decies tantum, nor the case of a joynt endictment against two, for a joynt endictment shall be accompted as severall endictments, and here if the Feme had been found culpable, perchance it might have been good, because though the wife only speak actionable words, yet the

8 Ed. 4. f. 21. 11 H. 4. f. 5. 9 E. 4. f. 1.

Action ought to be brought against the Husband and the Wife. Roll chief Iustice, The Declaration is not well laid, for this cannot be a joynt speaking of the words by the Husband and Wife, and therefore they ought not to be joyned in the Action, therefore there ought to be several judgements and damages if you recover, viz. One against the Husband, another against the wife, but here is a verdict found which helps it, and this case is all one with the Case of 9 Ed. 4. for there the Declaration was not good as it is not here, and here is not a verdict against both, but only a discharge, and he cited Rethorick and Chappels case, where an Ejectment terræ & hæredis dio not lie, yet there by releasing of damages to the heir judgement was given for the land, and here might have been a release of damages as to the wife if both had been found guilty, but here in effect is a judgement but against one of the Defendants. Ierman, Nicholas, and Ask Iustices to the same effect, and so judgement was given for the Plaintif.

Luddington and White.

Mich. 1652. Banc. sup.

Mich. 1651. rot. 458.

Demurrer to a plea in debt upon a Bill.

LUddington brought an Action of debt upon a bill against White, the Defendant pleaded, that after the money became due, he and the Plaintif did by parol submit to an award, and that there was an award made, that the Defendant should pay 8 l. to the Plaintif at such a house, and thereupon the Plaintif should give him a general release, and accordly he tendred the money, to this plea the Plaintif demurred, and for cause shewed that here is a submission by paroll pleaded after the day of payment expressed in the Bill, which is not good, being by paroll to discharge a debt due by specialty. But Wild answered, here were other things submitted besides this, and that may make the submission good. Roll chief Iustice. I see not what authority you have for this, nor how it can be, and 4 H. 6. if one be awarded before auditors to accompt, this cannot be referred, and here would be an inconvenience to take away a duty created by bond by paroll, therefore let the Plaintif have his Iudgement.

Discharge.

Referred.

Neve and Cros.

Mich. 1652. Banc. sup.

Arrest of Judgement in an Action upon the Case in nature of a Conspiracy.

NEve brought an Action upon the case against Cros for charging him with felony, and causing a Constable to carry him before a Iustice of Peace, and accusing him to the Iustice in these words, viz. He did come to my door, and set a Pistol to my Brest, and demanded money of me, and I for safegard of my life did give him what money he desired. Upon not guilty pleaded, and a Verdict for the Plaintif, it was moved by Fletcher of Lincolns Inn, that the words were not actionable, and therefore that the Plaintif ought not to have judgment, and that for these reasons, 1. Because there is but a matter of Trespass alleged in the words. 2ly. They are but argumentative, and do not charge the Plaintif directly with felony, and it may be the money demanded was due to the Defendant, and the Jury have found all that which sounds to charge the party with felony against

gainſt the Plaintif. Twiſden on the other ſide ſaid, that the words ought to be taken together, and ſo they are actionable, and ought not to be ſevered; And the ground of the Action is for charging him with felony, and bringing him before the Juſtice, and ſpeaking the words there. Roll chief Juſtice, If the words ſound to charge him with felony, the Action will lie, and we cannot conceive otherwiſe but that he would have robbed the party, and we ought not to divide the words, for this were to argue a male diviſis, And you might have pleaded ſpecially, or have given the ſpecial matter in evidence. Ierman Juſtice differed, but Nicholas and Ask Juſtices agreed with Roll, and ſo judgement was given for the Plaintif, niſi, &c. Caſe.

Smith and Ward.

Mich. 1652. Banc. ſup.

IN an Action of debt upon an Obligation to ſtand to an award, and a verdict for the Plaintif, it was moved in Arreſt of Judgement that the Award was not good, 1. Becauſe here is money awarded to be paid to Baron and Feme, whereas the Feme is no party to the ſubmiſſion. 2ly. Here is 50 l. awarded to be paid, but it is not expreſſed for what, or that it is to be paid in ſatisfaction of any thing. 3ly. The ſubmiſſion is of all matters in difference till April 1652. and the Award is of all matters till December following. Latch anſwered, as to the 1 Exception, That the Baron did ſubmit to the Award, as well for his wife as for himſelf, and the Award is to make an end of matters which doe concern the Baron and Feme. 2ly. It is not requiſite to ſhew why the 50 l. is to be paid, yet it is ſhewed here, viz. for the ending of all differences. 3ly. It doth not appear by the Record that any matter is awarded but what is ſubmitted. Roll chief Juſtice, The Husband may ſubmit for his Wife, and here is an Award on both ſides, and if the Award be good in part it is well enough, nor is it neceſſary to ſhew why the money is to be paid, for all differences are to be concluded upon payment of the money, and the releaſe is to be made after this, therefore let the Plaintif have his judgement, niſi. Arreſt of judgement in an Action of Debt upon an Obligation to ſtand to an Award. Submiſſion. Award.

Mich. 1652 Banc. ſup.

THe Court was moved for a Certiorari to remove divers informations preferred by an Informer at the Seſſions held at the Guildhall in London upon the Statute of primo Iac. concerning Leather. Roll chief Juſtice, The Informations were exhibited before the Juſtices of Peace, but it is a queſtion whether the Defendant cannot remove them, I believe there are preſidents to prove he may, otherwiſe the Defendant might be prejudiced; but enform us what the courſe is in the Common Pleas in ſuch caſes, In the mean time we will adviſe. Motion for a Certiorari.

Wall

VVall and his wife against Bye.

Mich. 1652. Banc. sup.

Pasch. 1652. rot. 70.

Judgement in an Action upon the Case for words reversed. Error.

IUdgement was given for the Plaintiffs in an Action upon the Case brought in Bristow for these words spoken of the Wife: She is Lews Reads Whore, and he knows her as well as her Husband. This Judgement was reversed upon a writ of Error brought in this Court, because it did appear by the Record that the words were spoken before the late Act made against adultery and incontinency, before which time such words had not been actionable.

Iennings and Downs.

Mich. 1652. Banc. sup.

Trin. 1652. rot. 546.

Error to reverse a Judgement upon a non sum informatus in an Eject one firmæ. Certiorari.

A Writ of Error was brought to reverse a Judgement for non sum informatus given in the Common Pleas in an Ejectione firmæ. The Error assigned was, that it appeared by the Record that the Declaration was before the Plaintif had any cause of Action. Wild answered, It doth not appear so, but if it do, then we say that there is a wrong original certified, and we pray that we may have a new Certiorari to have the true original certified. Roll chief Iustice, Take it, for it is in affirmance of a Judgement, which ought to be favoured.

VVebb and VVashborn.

Mich. 1652. Banc sup.

Arrest of Judgement in Trespas.

VVEbb brought an Action of Trespas for entring into his house and taking away divers goods against Washborn, and obtains a Verdict against him. It was moved in Arrest of judgement, and these Exceptions taken to the Declaration. First, That the Plaintif had declared for the taking away of a Trunk with writings, and doth not shew what the writings were. To this Wadham Windham answered, that the Declaration was good notwithstanding, and cited a Case adjudged, where an Action was brought for taking away of two Trunks with Cloaths, and it was not said what Cloaths, and yet held good: And a Case in 43 Ed. 3. 24. Another Exception was taken, That the Plaintif declared for the taking away of a great Beam, Scales and weights generally, and shews not what weights. To this Windham answered, that was well enough, because the Beam and the Scales and Weights do all go to the making up of one and the same thing, and have all a relation one to the other, as an Action of Trespas brought for the taking away de Caruca cum apparatu is well brought, as appears in the old Book of Entries. Latch on the other side said, that the Declaration is uncertain, and that it is not like the case of the Trespas de Caruca cum apparatu, for the Weights are nothing tending to make the Beam perfect, and it is as incertain as to bring an Action

for

for the taking away of five locks and keys, which hath been held to be naught. Hales on the other side said, that there is certainty enough, because it is all one to say a Beam with Scales and Weights, which makes all but one thing, as to say a Beam, Scales and Weights, or as to say a Ship with Anchors and Cables. Roll chief Iustice, How can we reduce the Weights to any certainty as the Declaration is laid? and if the Declaration had not been with the word and, it would not have helped it, for it may be there were a hundred weights, or a thousand weights. And therefore let the Iudgement be arrested nisi, &c. Another Action of Trespass was brought by the same party, wherein he declared for the taking away of two great Trunks locked, full of Linnen, Woollen, Pewter, & amongst other things, for 4 pair of hangings, against which also, exception was taken in Arrest of Iudgement for the incertainty. Roll chief Iustice, I conceive that four pair of hangings is certain enough, but here is no vi et armis mentioned in the Declaration, which ought to be in an Action of Trespass for entring into his house, and taking his goods, as the case here is, and therefore for this cause let the Plaintif shew cause why a nil capiat per billam shall not be entred against him. Postea.

Incertainty.

Declaration.

I was said by Roll chief Iustice, That if one find my goods, and refuse to deliver them to me, an Action upon the case lies against him, although he convert them not to his own use.

Action on the Case for goods found.

Bond and Martin.

Mich. 1652. Banc. sup.

BOnd brought an Action of Debt upon a Bond given unto him as Sherif to save him harmless, The Defendant pleaded a special plea, which amounted unto no more than that he had saved him harmless; to this Plea exception was taken, because he did not shew how he had saved him harmless. To this Wadham Windham answered, If it be that he hath from time to time saved him harmless, it is well enough. Roll chief Iustice, It is not so here, and therefore let the Plaintif have judgement, nisi.

Special plea to an Action of debt upon a Sherifs Bond.

Mich. 1652. Banc. sup.

IT was said by Roll chief Iustice, that in an Action of Trespass quare vi et armis, &c. There ought to be an express averment in the Declaration of the force, and it ought not to be expressed with a whereas there was such a force.

Where an express averment ought to be. Averment.

Baynton and Cheek.

Mich 1652. Banc. sup.

Trin. 1651. rot. 574.

BAynton brought an Action of Accompt against Cheek, as his receiver. The Case in sum was this, Baynton deposited two hundred pounds laid upon a horse-race in the hands of Cheek, to be delivered to the party that should win, according to Articles made betwixt the parties. Baynton supposing he had won the money, demands it of Cheek, who had delivered over the money to another whom he supposed had won the wager, and

Plea to an Action of Accompt.

the money being not delivered to Baynton, Baynton brings this Action against Check; Check the Defendant, as to one hundred pounds pleads, Ne unques receptor, upon which plea he was adjudged to accompt before Auditors, and before the Auditors he pleads in discharge of the accompt, that he had delivered over the money to another that won the wager. The Plaintif replyed, That there was foul play used by the other party, in striking one of the horses that ran the race upon the Nose, which was foul play, and against the Articles made betwixt them, and so he ought not to have delivered the money. The question was whether this was a good plea in discharge of the Accompt before the Auditors. Roll chief Justice said, The plea was not good, in regard that the Defendant was adjudged to accompt, which doth imply that the money was fairly won by the Plaintif. Latch on the other side urged, that the replication was not good, but is impertinent, and therefore that the Plaintif can have no Judgement though the plea in Bar be not good, but that there ought to be a Repleader. At another day Green moved for judgement for the Plaintif, and cited Hob. 112. Taskers case, That an issue joyned upon impertinent matter is not helped by the Statute, and Kent and Halls case in Hob. Rep. but here is only an informal issue, which is helped by the Verdict, as are Rawden & Tuts case, and Napper and Dawkes case in Hob. Reports, and Mich. 2 Car. Giggon and Purchases case, and said, that at the Common Law a Tryal upon a double issue was good, Broke Issue 30. 2ly. This plea of the Defendant ought to have been pleaded in bar of the Action, and not in discharge before the Auditors, 1 Ed. 5. 2. Brook Accompt 83. and Dyer 196. Hungerfords case. Latch on the other side said, that the Replication is imperfect, and that the Verdict helps it not, the Defendant alleges the Articles made upon the wager, and the replication is about striking of the Horse, and answers not the matter pleaded in Bar, for the Act of the Rider, viz. the striking of the horse is not the Act of Bish, who made the Articles, and besides here is no breach of Articles, for they doe not prohibite to strike the Horse, or to ride foul, according to the Laws of a Horse-race, and the Rider doth not appear to be Bish his Servant, but a third person, and an Action of the Case lies against him, and not against Bish, who for ought appears hath done nothing against the Articles, and the matter in bar of the Accompt is well pleaded, and could not be otherwise, as the Case is, and it is well enough, though it be not pleaded in bar of the Action, for he could not have pleaded ne unques receptor pur accompt render, 9 E. 4. 16. Dyer 19 H. 6. 5. As he could not have pleaded the general issue, and given the special matter in evidence; And he cannot plead thus in bar of the Action of Accompt, and there is not one book that says otherwise, 41 E. 3. 31. 5 H. 5. 5. 19 H. 6. 5. 22 H. 6. 49. 21 E. 4. 67. 5 H. 5. 1. 5 E. 4. 41. 1 E. 5. 2. 27 H. 7. 35. Which books do shew it may be as well pleaded before the Auditors, as before in bar of the Action, 14 E. 3. Fitz. Accompt 68. 21 E. 4. 54 By these books he is compelled to plead these matters before Auditors; and the other books are not expresly against it: And in this case here is not a bailment purely to deliver over, but there is subsequent matter which directs how it shall be delivered over, and this matter he must plead. But admitting the Bar to be ill, if the replication be impertinent, and that he hath confessed that he hath no cause of Action, then it is with us, and here is no pertinent matter pleaded to avoid the matter confessed, and so the Judgement ought to be against the Plaintif, 3 Report, Ridgeways Case is, That if impertinent matter be in a replication, which answers not the bar, Judgement ought to be given against the Plaintif, and the matter confessed is not in bar of the Action of accompt as is objected. 1 H. 7. 2. 21 H. 6. 26. Hales, The matter of delivery makes not the matter. The subsequent

Plea.

sequent matter is grounded upon the Condition made upon the delivery, Dyer 169. and here is an insufficient bar, and the matter of the replication is good, according to the matter alleged in the bar, for the Articles ought to be interpreted according to the intention of the parties, which was, that the race should be fairly won, which is not so here, 18 E. 4. 4. matter of Covenant by deed may be discharged by subsequent matter of fact; and the Riders here shall not be accompted meer strangers, for they are Instruments made by the parties, and there is confidence put in them to perform the act of riding, and their acts shall be the acts of the parties; And here is nothing shewed in the replication which destroys the Action. Roll chief Justice, If you have confessed the Articles, and alleged impertinent matter in the replication, how can you take advantage of an ill bar, and how can you interpret the intent of the Articles otherwise than is expressed by them? And how can we take notice here, that there was not fair play in the running of the race? and I doubt of the books cited by Latch, for where matter may be pleaded in Bar, the party shall not be compelled to come before Auditors, for that were unreasonable. If I deliver goods to deliver over, and the party do it not, he is accomptable to me, but if he deliver them over, he is not, for he may plead this in bar of the Action, and so is it in the Case at the Bar, and you might have given the special matter in evidence here by the meal Act, and this plea here before the Auditors is clearly void. The main doubt here is, whether there be apparent matter to the Court to hinder the Plaintiff from his Judgement, I conceive the Articles shall be interpreted fairly, and that there ought not to be foul play according to Common intendment, and it is material to shew there was foul play in the replication, and so the issue is well joyned, and Judgement ought to be for the Plaintiff. Ierman and Nicholas Justices to the same purpose as Roll.

Bar. Auditors. Accompt.

Plea.

Mich. 1652. Banc. sup.

IT was moved for Colonel Baxter, that he was elected high Steward of the Town of Colchester in Essex; and therefore that the Court would grant a mandamus to be directed to the Mayor there to swear him in that place. Roll chief Justice, If he be duely elected, and he refuse to swear him, take a mandamus.

Motion for a mandamus to Colchester to swear the high Steward there.

Iaques.

Mich. 1652. Banc. sup.

IN the case of one Iaques in an Action of Trespass quare vi, et armis, for the entring into his Land, It was said by Roll chief Justice, That if in an Action of Trespass vi & armis for entring into land, the Defendant plead his entry by virtue of a lease for years, this amounts to no more than not guilty, and the Plaintiff may demur upon the Plea, and shew it for cause of demurrer, that it amounts to no more.

What plea amounts to not guilty.

Demurrer.

Mich. 1652. Banc. sup.

Where one cannot be declared against in Custodia.

IN the case of one Poynes Mawrice it was said, that if one be committed to the upper Bench prison, for a misdemenour, and not for debt, one cannot declare against him, as against one in Custodia.

Mich. 1652. Banc. sup.

Motion for a certiorari to remove endictments.

THe Court was moved on the behalf of the Defendant, for a certiorari to remove certain endictments preferred against him in London, for selling of leather, to the end he may have an indifferent tryall, notwithstanding the Statute, which directs that the endictment be preferred in the County, were the offence was committed. Roll chief Iustice, The Statute was made for the ease of the Defendant, and therefore he may remove the endictment, otherwise he shall be in worse case than he was before the Statute. Therefore take a Certiorari.

Yongue and Petit.

Mich. 1652. Banc. sup.

Pasc. 1652. rot. 159.

Demurrer to a repiication in debt upon a Bond.

YOngue brought an Action of debt against Petit upon an Obligation and declares, that whereas at the request of the Defendant he did become bound with a third person, for the payment of a certain sum of mony unto I. S. at a certain day, the Defendant became bound in an Obligation to the Plaintiff, the condition of which Obligation was, that if the Defendant did pay the mony unto I. S. at the day limitted, for which the Plaintiff was bound, and in the mean time should save him harmlesse, that then the Obligation should be void, and for not performing this condition he brought his Action. The Defendant pleads that he caused the party, with whom the Plaintiff was bound, to submit himself to Prison, and that the Plaintiff was not damnified. The Plaintiff replyes, and denyes not the Bar; but sayes that a latitat was sued out against him, and that he feared to be arrested, and upon this replication the Defendant demurs, and these exceptions were taken to it. 1. That he doth not say he took out a latitat prout patet per recordum. 2ly. It was questioned how the words in the mean time shall be understood. For the first exception Latch held it not material, and for the second he held that they refer to the whole condition. Roll chief Iustice said, it is not necessary here to plead non damnificatus if the party be in prison, and the words in the mean time refer to the last words only of the condition; But one hath pleaded an ill plea, and the other hath alleaged an ill breach, therefore nil capiat per billam, nisi. Yet we will advise.

Relation.

Mich. 1652. Banc. sup.

Endictment. quashed.

AN endictment was quashed for not repairing a highway, because it did not set forth from what place to what place the way did lead.

The

The Maior and Commonalty of London against Hatton.

Mich. 1652. Banc. sup.

THe Maior and Commonalty of London brought an Action of Covenant against Hatton, for not paying a rent reserved by them upon a lease for years made unto him of the Garblers office. The Defendant pleaded that this office was an office of trust reposed in the City of London, and could not be let for years, and consequently there was no ground of Action. To this plea the Plaintiff demurs. Hales held that this office may be let for years, because the Maior and Commonalty of London have a Fee simple in the office by their charter, and that they have not only a meer trust reposed in them to execute it. And 2ly. If it could not be granted, yet here is no forfeiture, for this lease shall be accompted but a deputation, and not a granting over of the office. And 3ly. The Lessees covenant shall bar him from pleading this plea. Wadham Windham prayed a day to be heard. Roll chief Iustice, It will be hard for you to maintain the Defendants plea, For without doubt the Maior may make a Deputy to execute this office; But here he hath a Fee simple in it, and may thereby make a lease of it, and the Lessees Covenant will bind him to pay the rent. Iudicium pro querente, nisi, &c. At another day Wadham Windham put the Case, and argued that the office of Garbler is not grantable, because that this office is an office of trust reposed in a corporation, and it is so reposed for the publique good, and the office it self is not vested in the Maior, and therefore he cannot grant it, although he may make a Deputie to execute it, for there the Acts of the Deputie do light upon the Master to be answerable for, 29 H. 6. 44. Dyer 238. a Maior of a Town may make a Deputie; but he cannot grant this office or make a revenue of it. Roll chief Iustice, It is considerable in regard it is an office of trust, whether it may be leased out, although he may make a Deputy. Therefore argue it again the next Term.

Demurrer to a Plea in Covenant.

Deputation. Lease.

Baker and Andrews.

Mich. 1652. Banc. sup.

Trin. 1650. rot. 1469.

BAker brought an Action of Trespass, quare vi & armis clausum fregit, and for taking his Cattel; the Defendant as to the force and arms pleads non cul. and as to the rest he justifies that the Cattel went in through the defect of the Plaintiffs inclosures; the Plaintiff replyes that the Cattel came in through another mans fence into his ground; to this replication the Defendant demurs, & shews for cause that the Plaintif doth not assign where the place of the other Close lyes, through which the Cattel came through. Yard said it is not necessary to shew where it lyes, for they went not in where the Defendant hath alleged, & so the traverse is well taken. Wadham Windham on the other side answered, here is a new assignment, and he answers not the Trespass for which the Action is brought, and because it is a new assignment, we must give a new answer; and therefore you must shew the place where your new assignment lyes. Roll chief Iustice, He pleads no more but that the Cattel came in at another place, than is plea-

Demurrer to a replication in Trespasse vi et armis.

Plea. ded, and he needs not shew the place, But here the Defendants plea is not good, for he pleads a prescription where it ought to be a custom, that the occuppers of the land ought to make the fences, and he ought not to prescribe in the person. Judgement for the Plaintiff, nisi.

Mich. 1652. Banc. sup.

Who may take advantage of a fault in a Plea. Advantage. BY Roll chief Justice, If there be a fault in a plea in matter of form, and after there is a fault also in the replication, and the Defendant demurs to it, but shews no cause of demurrer, he shall take no advantage of this fault in the replication; but he who joyns in the demurrer shall take advantage of the ill plea, and so was it adjudged, Pasc. 1. Car. in this Court in Prat and Thimblethorps case, and he said that all faults in pleading are incurable at the Common Law, and therefore those that are not helped by Statutes are left as they were at the Common Law.

Mich. 1652. Banc. sup.

Motion to quash an order of Sessions. ONe was made Constable by order of a quarter Sessions, but the party refused to serve, and removed the order hither by Certiorari, & moved to quash the order but the Court would not do it although ther were material exceptions taken against it, but ordered him to plead, because they perceived the party was stubborn, and they would not give encouragement to such persons.

Heath and Vdall.

Mich. 1652. Banc. sup.

Arrest of Judgement in an Action upon the case HEath a Carver brought an Action of the Case against Vdall, and declares among other things for plundering of him of viginti fardellas Anglice packs, and in arrest of Judgement it was moved that the words viginti fardellas Anglice packs is uncertain; But Maynard argued that it might be good, because the Carver could not declare otherwayes, for he could not know what was in the packs, and he cited one Bedingfields case, Trin. 10. Car. where an Action was brought for a library of books, and for apparell, and adjudged good; But Roll chief Justice said, it could not be good for the apparel. Wadham Windham on the other side held the words uncertain as they are, and said he ought to have shewed that they were packs with goods, or have shewen what was in them, for a pack is but a measure of a thing. Roll chief Justice answered, if it be but a measure of a thing, then no damages are given for them, and then the Action is good for the rest; But we will advise. Afterwards in the same Term Maynard moved for the opinion of the Court, and thereupon the Court held, that the words are uncertain as they are, for he ought to have expressed what was in the packs, and ruled a nil capiat per billam to be entred.

Declaration.

Levingston

Levingston and Crompton.

Mich. 1652. Banc. sup.

Levingston brought an Action in this Court against Crompton, The Defendant pleads that he is a Clark of the Chancery, and that all Clarks of the Chancery ought to be sued in the Chancery only, and not elsewhere, and demands judgement if he ought to make any other answer in this Court. Two Exceptions were taken to the plea, 1. He saith, That all Clarks of the Chancery have used to be sued in the Chancery, and not elsewhere, and doth not say, nor any of them have been used to be sued elsewhere, and though all of them have not been used to be sued elsewhere, yet that hinders not but that some of them have been sued elsewhere. 2ly. He pleads that he is a Clark of the Chancery, and ought to be impleaded in the Chancery held at Westminster, before the Keepers of the liberty of England, &c. time out of mind, which is not true. Hales answered, That this Court ought to take notice of the privilege of Chancery, although it be not well pleaded; But Roll chief Iustice denied that they ought to do it, and said, That it is the Custom for the Clarks of the Exchequer, when they plead their privilege, to bring the red book wherein their privileges are written into the Court, and upon sight of their privilege there written, it is used to be allowed, but it is not so of the privileges of the other Courts, but they must be pleaded, and so here, And because it is not well pleaded here, therefore shew cause why you should not plead in chief.

Exceptions to a plea of privilege.

Notice. Privilege.

Pitton and Rey.

Mich. 1652. Banc. sup.

Pitton appeared to an Action brought against him at the suit of Rey, but no declaration was put in against him. Upon an Affidavit that the Defendant was a Merchant, speedily to go to Sea, It was moved for him that the Plaintif might forthwith declare against him, that thereby he might direct his Attorney what to plead, and might have his liberty to be gone. Roll chief Iustice, By the course of the Court he hath three terms liberty to declare, but this is an extraordinary Case, Therefore let him declare Thursday next, otherwise he shall not declare till he come back. Nota.

Motion for the Plaintif to declare speedily.

Mich. 1652.

By Roll chief Iustice, A private Sessions of the Peace is not said to be held for the County.

Staples Case.

Mich. 1652. Banc. sup.

A Rule was read on the Capital side for Staples a Iustice of Peace of Sussex, to shew cause why an Attachment should not be granted against him for proceeding upon an Endictment of forcible entry, and fining the party, after a Certiorari was delivered unto him to remove the Endictment

Cause why no Attachment against a Iustice of Peace;

ment into this Court, and thereupon it was prayed that it might be granted, and Sir Tho. Styles, and Sir John Sidleys case 8 Caroli was urged, where an Attachment was granted in the like case. Wild on the other side prayed it might not be granted, because the parties endicted did not tender sureties to proceed to a Tryal upon the Endictment, as the Statute directs, and because the fine was set upon the parties before the Certiorari was delivered, and it is in the election of the Justice to set a fine upon the party, and refuse to admit the party to his traverse, as some do hold. Roll chief Justice, Upon view of the force the Justice may set a fine upon the party, and refuse to admit the party to his traverse, or plea, at his pleasure; but the case is not so here: and in 15 Car. it was resolved, that if a Certiorari be brought to the Sessions to remove an Endictment of forcible Entry preferred against divers persons, if some of them come in and find sureties for the damages, it is good for them all, to remove the Endictment for the rest, else it would be mischievous for them that find the sureties. And he said, that if any thing be done at a private Sessions of Peace, it ought to be returned to a Quarter Sessions, or into this Court. Upon view of the force the Justices of Peace are Judges, and may set a fine, and if there be Error a writ of Error may be brought. The rule was, that Staples be examined upon interrogatories, and make a return of the Certiorari Monday next, and that he restore the fine to the party.

Fine. Traverse. Plea. Error.

Wood and Mountney.

Mich. 1652. Banc. sup.

Bail not discharged by the death of the Principal. Bail.

IN the Case of Wood and Mountney, Roll chief Justice said, That if the Plaintif in a writ of Error die before the matter be determined, yet his Bail are not thereby discharged.

Webb and Washborn.

Hill. 1652. Banc. sup.

Arrest of Judgement in a Trover and Conversion.

THe Action was an Action of Trover and Conversion for divers goods; The Defendant pleaded not guilty, and upon issue joyned, a Verdict was found for the Plaintif. It was moved in Arrest of Judgement that the Plaintif amongst other things had declared for a Trunk with writings, which is uncertain. Wadham Windham for the Defendant said, the Declaration is certain enough, and cited a Case where an Action was brought for two Trunks of Cloathes, and doth not say what Cloaths, and yet adjudged good. Another Exception was taken, That the Plaintif declares for a great Beam, Scales, and Weights, which is also incertain. To this Windham answered, It was certain enough, because they all make but one thing, by reason of the relation they have one to the other; And in the old Book of Entries we find, that an Action of Trespass was brought pro Caruca cum apparatu, and adjudged good. Latch on the other side, as to the last Exception said, It is not answered, for the words are very incertain, and it is not like the case of the Trespass cited, de Caruca cum apparatu, for the Weights go not to the perfecting of the Beam, as the apparatus doth of the Plow, and it is as uncertain as to bring an Action for five Locks and Keys, which is not good. Hales answered, it is certain enough, for it is all one as if he had said, A Beam, Scales, and Weights, which is as certain as to say, a Ship with Anchors and Cables. Roll chief Justice, How can we reduce the Weights to any certainty as the Declaration is laid? and if the word and had been added it would not have helped,

ed,

ed, for they may be a hundred Weights, or a thousand. Another Exception was taken that the Plaintiff in another Action had declared for four pair of Hangings, which is uncertain: But Roll chief Justice said, That that might be well enough understood. Green at another day insisted, that four pair of hangings is very uncertain, but if it had been said four suites it had been well; Besides, the very word hangings is a doubtfull word, for it shews not whether the hangings were Silk or Stuff, or what else they were made of, as it ought to be. He also took an Exception that the Plaintiff had only shewed that here was a denyal and refusal to restore the goods, but no conversion of them is shewed. To this Hales answered, That the Action being an Action upon the Case, It is not necessary to shew the Conversion, and for the four pair of hangings it is well enough, for a pair is a couple when the word is used of dead things, and not like a pair of tongues which make but one thing nor is it material to expresse of what the hangings are made, as it is not in an Action brought for divers pair of stockings material to say, whether they were of thread, silk, worsted, or woollen, as hath been adjudged, and the word hangings is certain, for any one will conceive them to be meant of hangings of a room. Roll chief Justice, The Action is an Action upon the case, and it is not necessary to shew a conversion, for the Action is not brought for the conversion, and if it were so, if a demand, and a denyal be proved, doth not this prove a conversion? As an Action of the case lyes for keeping one out of possession, although the party doth enter afterwards, and the four pair of hangings is certain enough, and it is not like as where Latin words are mingled with English in a Declaration, and the words being taken in the English construction shall be understood to be eight hangings. Nor is it material to expresse of what the hangings are made; But the great doubt is, whether the words be meant of hangings for a room or not, and I suppose they cannot be meant of other hangings, the words being in English, and not in Latin with an Anglice, and I believe you cannot shew me any thing else, that the words can by common intendment signifie. Iudicium nisi. The case was again moved at another day by Latch, who urged that four pair of hangings are words uncertain; but if it had been four suits it had been well, so that here is a misapplication of words to expresse the thing meant, and he might as properly have said a suit of Shoes, or a suit of Conies. If one say he hath lost a hanging, this is uncertain of it self, for it is the predicament of situs and not of substance, for a hanging is a posture, and the word pair makes it more uncertain than it was without it. Hales answered, that it is certain enough, for the word hanging is used here substantively, and not as a participle, and the common use of the word is only applicable to the hangings of a room, and the four pair shall be understood eight hangings. Roll chief Justice, A pair is properly when one of the things so called, cannot be properly used without the other; but yet the words may be also understood so many couple, and here you cannot intend the words to mean so many suits of hangings, and you might have expressed your meaning by so many pieces of hangings, and therefore it seems doubtfull. Ierman Justice, Here the words do not expresse the number of the things, as they do when you say a pair of Oxen or the like. Nicholas as Ierman, Ask Justice, A pair is uncertain, for that word may be meant more than two in number, as when you say a pair of cards, and a pair of hangings in some places is meant a suit of hangings. Roll chief Justice, If it be so, then it is more uncertain, the word hangings may be good enough; but how can the number be known? Curia advisare vult. Afterwards the Court moved the Defendant to suffer the Plaintiff to amend his Declaration, and to plead anew, and to consent to a new tryall.

Case. Trover and Conversion.

Askwiths Case.

Hill. 1652. Banc. sup.

Motion to quash an order of Sessions.

THe Court was moved to quash an order of Sessions made at Durham against Askwith, for not serving the office of a Constable, or finding an other able person to serve the place for him, being elected according to the custom of the place where he was elected to serve. The Exception taken was, that it is not shewed that he was elected at a Court Leet, and the Sessions have no power to elect a Constable. Rollchief Justice, He is a Constable elected by a by-Law, it is not necessary there should be any other election then according to the custom, and he must serve in his turn, or contribute to the charge for another to serve for him, and this is a good custom & used in many places, and I do find one my self in my turn in one place, and make no use of my privilege to avoid it. Another exception was taken, that the complaint made of the party was, that he would neither serve the office, nor contribute for another to serve it, and the order is only that he refused to contribute and so is not warranted by the custom, by which he hath an election to serve or contribute. Quashed, nisi, &c.

By Law.

Custom.

Hill. 1652. Banc. sup.

Creditor examined upon oath if his debt were reall.

A Prisoner was brought into Court (by a habeas corpus) out of the Fleet to the intent to turn him over to the Marshalsea to charge him with an Action here, whereupon the creditor was examined upon his oath whether the debt was real, for which he surmised he would bring his Action, and upon making oath thereof the Prisoner was turned over accordingly. Nota.

Smith against Holyman.

Hill. 1652. Banc. sup.

Arrest of Judgement in Assumpsit. False English

IT was moved in arrest of Judgement in an Action upon the case upon an Assumpsit, and Exceptions taken. 1. That the Defendants Christian name was mistaken. And 2ly. That the jurata was erroneous, for it says in a plea of dept, instead of a plea of debt, and the Judgement was arrested for dept written with a P. is no word, though it sound like debt written with a B.

Custodes and Howell Gwin.

Hill. 1652. Banc. sup.

Judgement against one convicted of forgery.

HOwell Gwin was brought to the Bar being convicted for forgeing of a deed, and was demanded what he could say why Judgement should not be given against him. Boynton of Counsel with the Prisoner moved the Court, that in regard there was an information of perjury depending here against the witnesses, upon whose Testimony the Prisoner was convicted of the perjury, and that the Prisoner doth endeavour to proceed with all the speed that is possible against them in this information, that the judge-

Judgement may be staied in the mean time against him. Roll chief Iustice answered, if they be found guilty of the perjury, they shall be punished; but we will give Iudgement against your Client in the mean time, which was done accordingly in these words following, viz. you are convicted of forgeing a deed, by putting a dead mans hand unto it; therefore the Court gives this Iudgement against you, that you are fined at a hundred pound, and shall stand on the pillory two hours before the Hall dore, with a paper on your head shewing the nature of your offence. Memorandum the party cut off a dead mans hand, and put a pen, and a seal in it, and so signed, and sealed; and delivered the deed with the dead hand, and swore that he saw the deed sealed and delivered. Iudgement for forgery.

Mich. 1652 Banc. sup.

MRs. Lucy Fotherby was brought into Court to be turned over into the Marshalsea out of the Fleet with an intent to charge her with an Action of debt. Against this it was urged that she was a Prisoner in the Fleet, committed thither by an order of the Court of Chancery. But Roll chief Iustice answered, this order is nothing to hinder her turning over, if the debt be reall, and so upon proof that the debt was reall she was turned over. A Prisoner turned over. Prisoner.

Locky and Dumiloe.

Hill. 1652. Banc. sup.

Hill. 1650. rot. 1462.

VPon a special verdict in an ejectione firmæ, the case fell out to be this, I. S. seised of lands in Fee makes a lease of it to I. D. at Will, A. B. puts the Tenant at Will out of possession, and after the Tenant at Will enters, and takes a lease at Will of him that put him out of possession; the question was, whether he should hold the land by virtue of his first lease, or by virtue of his second agreement. To this Roll chief Iustice said, if one make a lease at Will to one, and he be ousted, and then enter again and take a new estate, the Will is determined; but a stranger cannot determine his Estate without his consent; but here he hath determined his first Estate by his new contract with the disseisor of his Lessor. And he said, if Livery and Seisin be made upon one Acre of land in the name of two Acres, it is good for both the Acres, for it is not necessary that the party that gives the livery should go to all the land mentioned in the deed of Feoffment. And he also said, that if Tenant at Will cuts down a tree upon the land, which he holds at Will, by this Act he hath determined his Will. Special verdict in an ejectione firmæ. Will. Determination. Livery and Seisin.

Drake and Drake.

Hill. 1652. Banc. sup.

DRake brought an Action against Drake for these words, viz. Thou hast preached lyes in the Pulpit; the Plaintiff being a master of Arts, and incumbent of a living. Wadham Windham held the words actionable, because they were spoken of the Plaintiff in relation to his profession Arrest of Iudgement in an Action for words.

sion, and cited one Hinkes case, where these words spoken of the Plaintif being a Brasier were held actionable, viz. Thou hast cozened me of a Pan. And if one say to another, Thou hast poisoned a man, If the man be dead, the words are actionable, although he doe not say that he did it wilfully. The Court enclined the words are actionable, because they are scandalous. And the rule was Iudicium nisi, &c.

Hill. 1652. Banc. sup.

Motion for a Certiorari to remove an End.ctment.

WAdham Windham moved for a Certiorari to remove an Endictment preferred against one in Newgate. Roll chief Iustice, He lies there for murder, and is outlawed thereupon, yet take a Certiorari to remove the Record, for his fact was the stabbing of a man, and stabbing is in its nature but felony, and is not murther, although the party cannot have his Clergy for it, by reason of the Statute made by King James against Stabbing, else by the Common Law he might have had it.

Felony.

Murther.

Ashworth and Sir Tho. Stanley.

Hill. 1652. Banc. sup.

Arrest of Iudgement in an Ejectione firmæ.

UPon a Verdict given for the Plaintif in an Ejectione firmæ, It was moved in Arrest of Judgement, That the Ejectment is laid to be of three Messuages or Tenements, and a Toft, which as to the Messuages or Tenements is incertain. Roll chief Iustice, You move too soon, for it may be the Plaintiff will release the damages as to the Messuages or Tenement, and take his judgement only for the toft, and the Action lies well enough for that.

Damages.

Ejectione firmæ.

Hill. 1652. Banc. sup.

Motion to discharge recognizances of the peace.

TWisden moved to discharge Sir Thomas Revell and others of their recognisances for the peace in which they were bound the last Michaelmas Term, because the Affidavit upon which they were bound was only to this effect, That the Prosecutor goes in fear of his life when he goes into such parcels of land, whereas in truth those lands are setled upon Sir Thomas Revell by decree in Chancery, and the Prosecutor hath also brought 18 several Actions against the Tenants of the lands, and hath declared against none of them, and there are four Affidavits against the first Affidavit. Green on the other side said, that the party is in Court, and says he is still in fear of his life, and prays he may not be discharged. But because upon reading the Affidavits and examining the matter, it appeared to the Court that they were bound to the peace upon malice, and for vexation, they were discharged.

Peace.

Hill. 1652. Banc. sup.

Who ought to repair Highways of Common right.

BY Roll chief Iustice, All High ways of common right are to be repaired by the Inhabitants of that Parish in which the way lies. But if any particular person will enclose any part of a way or waste adjoyning, he thereby takes upon him to repair that which was so enclosed.

Mas.

Massey and Aubry.

Hill. 1652. Banc. sup.

Arrest of judgement in debt upon an Obligation to stand to an Award.

An Action of Debt was brought upon an Obligation to stand to an Award: The Defendant pleaded that the Arbitrators made no Award; The Paintif replies that the Umpire made an award, and sets it forth, and assigns the breach, and upon issue joyned, and a verdict for the Plaintif, It was moved in Arrest of Judgement that the assignment of the breach was not good, for the incertainty of it, for the breach is assigned upon but a part of the Award; for the breach assigned is, that the Defendant should pay the Arrears of rent due after the purchase of certain lands; and doth not shew what these Arrears are. But Roll chief Justice said, That the words since the purchase thereof seem to make this certain, yet stay till the other moves. At another day the case was moved again, and the same exception insisted upon by Barry of the Inner Temple who formerly moved it. Hales held the Exception not good, and that the breach was well assigned, because though it seem uncertain of it self, yet it relates to a thing which makes it certain; As an Award for one to deliver to another all the goods in such a Shop which belonged to him, hath been held to be good. But Barry answered, That it is utterly incertain, and that there is nothing in the Award which can make it certain, and here is a four-fold incertainty in the Award. 1. It cannot be known what these arrears are that are awarded to be paid. 2ly. It appears not by the Award for what lands these arrerages of rent awarded to be paid are due, for there are no lands mentioned, but only two leases of land. 3ly. It appears not by whom the arrerages are due. 4ly. It appears not to whom the arrerages are due. Roll chief Justice, All the matter is, whether it appears that these arrerages of rent awarded to be paid were in question or no, and it seems they were, because the lease and the rent thereupon reserved are both in question; but it is not certain what these arrears of rent are, and so the party that is awarded to pay them, cannot tell what sum of mony he is to pay. Jerman Justice said, he may know, because he was Tenant of the land. Barry replyed he cannot know when the purchase was made, and the arbitrement is that the party shall pay all the arrears since the purchase. Curia advisare vult. At another day the case was again moved by Barry, and exceptions taken that the breach was assigned upon a thing not submitted unto, or awarded to be performed. And secondly. The award is incertain in many things. First, It appears not what rent was due to be paid, but only by implication, which is not good. Secondly, It appears not for what the rent is due; nor 3ly. How much rent is due, and Salmons case, in the 5. rep. was cited. Also it was objected that the award was not finall, and concluding, and therefore not good: Also the Award is unreasonable, and for that cause also it is not good, and he cited 21 E. 4. f. 40. and 17 E. 4. f. 51. and prayed for the Defendant that judgement might be stayed. Hales on the other side prayed for judgement, & said, That the Arbitrators were not to ascertain particularly the rent to be paid, but it is sufficient for them to make the Award touching all the differences betwixt the parties, and an averment may ascertain the particular things, being they are only matters of fact, although one may not be admitted by an averment to supply an Award in a matter, wherein it was in the substance of it defective before. Roll chief Justice, What certainty is there by the Award that the party

party shall enjoy all his right in the two leases in difference between the parties for the payment of the rent, Both parties know what rent is due, reserved by the leases, but how can the party know what the arrears are which are accrewed since the purchase? for how can he know when the purchase was made? for it is made by a stranger, and what if the stranger will not tell him when he made it? so that me thinks the Award is unreasonable, and then it cannot be good. The rule was, Nil capiat per Billam, Nisi, &c.

Award.

Hill. 1652. Banc. sup.

Question in Arrest of Judgement in an Action upon a Bill of exchange.

THe question being upon a motion in Arrest of judgement in an Action brought for money paid upon a Bill of Exchange brought by a wrong person, to whom the Bill belonged not, and a verdict for the Defendant, Twisden said, That if money be paid to a wrong person upon a Bill of Exchange, if the wrong person do shew the Bill, by the Custom of Merchants this is a good payment, and the party that paid it shall not be charged again.

Custom.

Wild, It is doubtfull whether the Custom be so or not. But Roll chief Justice said, here is a verdict for the Custom, and therefore it were well if the parties would agree to a new tryal, but if they will not, take your judgement, because the verdict hath found it a good custom.

Custodes against the Inhabitants of Stoneham in Suffolk.

Hill. 1652. Banc. sup.

Motion to set a fine upon a conviction for not repair of a High-way.

THe Inhabitants of the Parish of Stoneham in Suffolk were indicted for not repairing a High-way, and a verdict found against them. The Court was moved that a good fine may be set upon them, because the way is not yet amended, and a Traveller that passed that way hath lost his horse since the Tryal, by reason the way was so bad, so that the Horse brake his Leg. Twisden on the other side moved the fine might be respited, because there was a contest between this Parish and another which of them ought of right to repair the way, and in regard this Parish is very poor, and lastly, because the way cannot be amended until Summer, and then it shall be done. Roll chief Justice, The fine shall be set upon you for not repairing it already, because the verdict found you ought to do it, and the Country suffers by your neglect, Therefore take a Distringas to levy a fine of twenty pounds of the Parishioners for not repairing it.

Fine.

Distringas.

Hill. 1652. Banc. sup.

Motion for the Plaintiff to discontinue his Action.

WIld moved the Court that paying costs the Plaintiff might have a rule to discontinue his Action, because there is such a travers now taken that the title of the land in question can never come to be disputed. Roll chief Justice, You may do this by the course of the Court without motion, therefore why move you for it? But I conceive your reason is, because there is a peremptory rule of Court upon you to try the cause this next Term, and now you move to avoid the contempt you may fall into, for disobeying that rule, if you should not go to a tryal. Yet pay good costs and discontinue your Action. Q. Nota.

Contempt.

Hill.

Hill. 1652. Banc. sup.

THe Court was moved that a Feme that was sued only as an Executrix might be discharged upon putting in Common Bail. Roll chief Iustice, It is the common course if there be no special cause of Action against an Executor, as a Devastavit, or the like, for Common Bail to be admitted. Motion that Common bail might be accepted.

Hill. 1652. Banc. sup.

HOdsden One of the Attorneys of this Court, was together with another made a Lessee in an Ejectment Lease, and would not grant an Imparlance to the Defendant, as the usual course is, because he is an Attorney of this Court, and so claims his privilege, that the Defendant may answer him this term, or else he will enter judgement against him for want of a plea. Q. what was done hereupon. For an Imparlance. Privilege.

Hill. 1652. Banc. sup.

IN the case of one Hoff the Court was moved to confirm a rule made between the Plaintifs Attorney and the Defendants, for a Tryal at the Bar. Roll chief Iustice, Let it be so, for if the Attorneys agree to reasonable things, we will not oppose them, But the Attorneys ought not to make rules of themselves. Motion to confirm a rule. Rule.

Hill. 1652. Banc. sup.

BOynton moved for a Deer-stealer that was convicted at the Sessions in London upon an Endictment preferred against him upon the late Act made against stealing of Deer, and removed hither by a Habeas Corpus, that the Return might be filed, and took this Exception, viz. That it appears not in what Parish the offence was committed, as it ought to doe. Roll chief Iustice, Here is a conviction and a judgement in the Case, and the party is in Execution, and therefore bring your writ of Error if the judgement be erronious, for we will not overthrow it for a fault in the return of the Habeas Corpus: But because it did appear to the Court that the party was convicted behind his back, they moved the Councel to advise of a way how he may come to a fair tryal for the satisfaction of the party, and of the people; For it is a hard case, and let the Marshal take him in the mean time, And we will also advise. Exceptions to a return of a Habeas Corpus. Error.

Hill. 1652 Banc. sup.

BY Roll chief Iustice. If a sum of money be to be levied upon a Corporation, it may be levied upon the Maior or chief Magistrate, or upon any person being a Member of the Corporation. This was spoken in the Case of the Town of Colchester in Essex. Nota. How money is to be levied upon a Corporation.

Hill.

Hill. 1652. Banc. sup.

Motion for a Sheriff to return his writ. Pain. Affidavit. Sugestion.

THe Court was moved that a Sheriff might be ordered to return a Writ upon a pain. But Roll chief Iustice answered, let him return it, but not upon a pain, because here is no Affidavit to prove that he refused to return it; but only the suggestion of the Councel at the Bar.

Hill. 1652. C. B.

Who may defend a title in Trespasse and ejectment.

BY Pinsent protonotary of the common place. If one move that the title of land doth belong unto him, and that the Plaintiff hath made an ejector of his own, and thereupon prayes that giving security to the ejector to save him harmlesse, he may defend the title, this Court will grant it; but will not compell the Plaintiff to confesse the lease, entry, and ouster, except he will be ejector himself; But it is not so in the Court of the upper Bench, for there in both cases they will compell him to confesse lease, entry, and ouster. But Q. for I have not known it so ruled.

Hill. 1652. Banc. sup.

Order of Sessions quashed.

AN order of Sessions made at Arondell in Sussex for paying so much money weekly to a Parish, towards the keeping of a Bastard Child, was quashed, because it did not appear by the order, that the Child was born in that Parish to which the mony was awarded to be paid.

Hill. 1652. Banc. sup.

Motion to discharge the plea of engagement. Certificate.

THe Court was moved to discharge the plea of not taking the engagement pleaded to a Soldier in the States service in Ireland, upon a certificate under the hand and seal of an officer in the Army there, under whose command he was, that he had taken it, and also upon a certificate under my Lord General Cromwells hand, and Coronel Whaleys hand, that they did believe the other certificate was true. Roll chief Iustice answered, we cannot help you, for our hands are tyed up by the Act, from which we must not vary. Nota.

Hill. 1652. Banc. sup.

Whether one endicted of perjury be bailable.

ROll chief Iustice said, that he doubted whether one endicted of perjury may be bailed, although the clarks of the criminal side said he might. Q.

Brightwell and Robson.

Pasch. 1653. Banc. sup.

Arrest of judgement in an Action upon the case.

AN Action upon the case was brought for delivering in a false note of goods, for which excise was to be paid into the office of excise, whereby he was compelled to pay 50 l. to his damage, &c. upon not guilty pleaded and

and a verdict for the Plaintiff. Green moved in arreſt of Judgement, becauſe that the Declaration did not ſet forth the Act of Parliament, which gives authority to the commiſſioners of excise. And ply. The damage is not coupled with the fraud, nor is it expreſſed how he was compelled to pay the 50 l. and the Court is not bound to take notice of the Ordinance of Parliament touching the officers of the excise, becauſe it is not a general law. But Roll chief Iuſtice anſwered, that the fraud is the ground of the Action, and all the other matter ſet forth in the Declaration is but matter of inducement to the Action, and it is not requiſite to be ſo punctual in ſetting that forth as is ſurmiſed, and we are bound to take notice of the Ordinance, and the Action brought is to recover damages cauſed by the fraud, and it is no more neceſſary to ſet forth all the circumſtances occurring in acting of the fraud, than for one to ſet forth all proceſſes in an Action grounded upon a fraudulent Judgement obteyned againſt him, by which he is damnified. Iudicium niſi, &c. pro querente.

Inducement. Notice.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, If one that is bound to the Peace do break his recogniſance, he may be endicted upon it, for this is a new offence.

Endictment for breaking the Peace.

Paſc. 1653. Banc. ſup.

The Court was moved upon an Affidavit to diſcharge a Priſoner brought to the Bar by a habeas corpus, becauſe he was arreſted on the Sabbath day. Roll chief Iuſtice, plead this matter to his Action, that arreſted you, for we cannot diſcharge you upon an affidavit.

Motion to diſcharge Priſoner.

Cuſtodes and Rickaby.

Paſch 1653. Banc. ſup.

Rickaby convicted of Felony for killing a man during the wars, and brought hither by a habeas corpus; moved by his councell to be diſcharged upon the Act of the late general pardon. Roll chief Iuſtice, It appears not to us, whether you are excepted out of it or no. But enter your ſurmiſe upon the Roll by the advice of your councell as you will ſtand to it. Poſtea.

Motion to diſcharge a Priſoner upon the general pardon. Surmiſe.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, One cannot anſwer for an infant as Guardian, either in the Chancery or in any other Court, except he be aſsigned Guardian by the Court, for if he might that were to make himſelf his Guardian, and that might prove to the damage of the infant, therefore if one will ſue an Infant, he muſt move the Court to aſsign a Guardian that may anſwer for him; But an Infant may ſue per prochein amy, though his prochein amy cannot anſwer for him.

Who may anſwer for an Infant as Guardian. Motion. Prochein amy Infant.

Pasch. 1653. Banc. sup.

Who may be a witnesse.

BY Roll chief Iustice, although upon a Tryal, one who is a Legatee by a Will may not be admitted for a witnesse to prove that will, yet he may be examined as a witness to prove a deed or other thing, which hath not relation to the will, in respect of the interest which he claims by the Will. And he then also said, that Deeds were inrolled at the Common Law, for the preservation of them, although not to pass any estate, as it is now by the Statute of Enrolments made, 4 H. 7.

Enrollment.

Pasch. 1653. Banc. sup.

How a disseisin is taken away. Entry.

BY Roll chief Iustice, If one disseise me, and a Stranger enter upon the disseisor for me, this Entry takes away the disseisin; and if a Copyholder of a Mano^r enter as a Commoner, it is in right of the Lord, although it be not by his command, nor he have any notice of it. Nota

Pasch. 1653. Banc. sup.

Arrest of Iudgement in an Act on to noa paying monies upon a bill of exchange.

AN Action was brought for not paying monies upon the receipt of a bill of exchange according to the custom of Merchants, and upon a verdict found for the Plaintiff it was moved in arrest of Iudgement, and the exception taken was, that it appears not whether the demand of the mony sued for was according to the old stile, or according to the new, and so it is incertain whether the mony was due, when it was demanded or no, for if it were demanded according to the new stile it was not due; but if according to the old stile then it was due for the new stile is 10. dayes before the old Twisden answered, it shall be accompted according to the old stile, for that is used here in England, and he said, if there be two Merchants that have a joynt trade, and one of them accept a bill of Exchange, if he do not pay it, an Action lyes against the other. Roll chief Iustice, If the bill of Exchange be accepted there is no necessity to allege a demand, and the demand here is not laid as part of the custom, upon which the Action is founded. Therefore let the Plaintiff have his Iudgement,

D.mand.

Herbert and Lane.

Pasch. 1653. Banc. sup.

Arrest of Iudgement in an Action upon the case.

HErbert a Carryer brought an Action upon the case against Lane an Inn-keeper, for goods lost out of the Inn, viz. certain packs full of linen cloath and other goods, and after a verdict for the Plaintiff it was moved in arrest of Iudgement, that it doth not appear by the Declaration, what sort of cloath was in the packs, nor of what value the cloath and goods were, and so the Declaration is incertain. But Roll chief Iustice answered, that the Declaration is good enough, especially now there being a verdict in the case.

Hill.

Paſch. 1653. Banc. ſup.

By Roll chief Iuſtice, A Certiorari to remove a Record ought not to be made but to a known Officer who is known to have the cuſtody of Records, and upon a ſurmiſe that he hath ſuch a Record in his hand; and therefore We will not upon an Affidavit grant a Certiorari, but upon a ſurmiſe made upon the Roll. Where a Certiorari may not be granted. Affidavit. Surmiſe.

Paſch. 1653. Banc ſup.

Count Arundel and my Lord Chandois, to whom Count Arundel was ſecond in a duel being formerly endicted at Surrey Aſsizes before Iuſtice Aſk & Iuſtice Warburton for killing Mr. Hen. Compton, & found guilty only of Manſlaughter, by the grand Inqueſt were brought to Bar to be arraigned for it, and were not admitted to be bailed, but were delivered over to the Marſhal to be brought again at another day, Nota. Bail denied for Manſlaughter.

Paſch. 1653. Banc. ſup.

John Weeks who had been endicted and convicted upon the Statute of King Iames made againſt ſtabbing, being formerly brought to this Bar did plead the general pardon which he had ſued forth, and prayed it might be allowed; But then the Court ſaid they knew not whether he were excepted out of the general pardon or not, and ordered him to enter his averment upon the Roll, that he is not excepted, and then to appear again at another day; at which time he was brought again, and then he declared he had entred his Averment, and produced his pardon, and prayed it might be allowed, which after a grave admonition made to him by Mr. Iuſtice Ierman; exhorting him to repentance and amendment of life, was done. Pardon allowed. Surmiſe entred.

Harris and Tooker.

Paſch. 1653. Banc. ſup.

Harris brought an Action upon the Caſe againſt Tooker for turning of an old Water-courſe from his Mill to a Mill which the Defendant had lately erected, and obtains a Verdict. The Defendant moves in Arreſt of Iudgement, 1. Becauſe it appears not by the Declaration what eſtate the Plaintiff hath in the Mill, for he only ſays that he hath been ſeiſed of it. 2ly. It is not ſhewed from whence the water runs, as it ſhould be. 3ly. The erecting of the new Mill is not actionable, but the diverting of the water to his damage, and therefore ought not to be jumbled together. Roll chief Iuſtice, It is a damage to turn the water out of its antient courſe, and it is not needfull to ſay that there is a new Mill erected. But what ſay you to the firſt Exception, viz. That you have not ſhewed what eſtate you have in the Mill. Wild anſwered, they had ſhewed it. Roll chief Iuſtice, Be it ſo or not the Action lies, for what eſtate ſoever he hath an Action of the Caſe will lie, therefore take your Iudgement. Arreſt of Iudgement in an Action upon the Caſe. Caſe.

Pasch. 1653. Banc. sup.

Arraignment for Manslaughter.

MEmorandum, This day by Rule of Court my Lord Chandois and Count Arundel were again brought to the Bar and arraigned for Manslaughter. Chandois as Principal, and Arundel as accessary for killing Mr. Henry Compton in a duel. They confessed the fact, and craved their Clergy and Peerage by the Statute of 1 Ed. 6. But because the Court doubted whether the Statute was repealed or not, and in regard the prisoners were not willing to lie longer in prison, the Court refusing to bail them, because the fact was notorious, they waived their Peerage, and prayed their Clergy as Commoners of England; Whereupon the Ordinary was called, who appeared, and brought his Book, which was a fair Latine Psalter. The Court called for the Book, and seeing it to be Latin, commanded him to bring an English Book, which he did. But because the Officer was not provided who should have burned the Prisoners in the hand, the Court would not then hear them read though the prisoners urged it; But they were ordered to be still in Custody till another day, and then to be brought again.

Clergy.

Trin. 1653. Banc. sup.

Motion for a reference to the Secondary.

TWisden moved for a reference to Hern the Secondary, and put the case to be this. A Scire facias issued forth against Executors, and the Sheriff returns nulla bona: After, upon a supposal by a testatum, that the Executors had wasted the goods, a new scire facias with a fieri facias in the same writ issued out, according to the new way used, and upon 2 nichils returned a judgement was given against them de bonis propriis, and the parties were never summoned or had any notice of the proceedings. Roll chief Justice, If you be condemned upon 2 nichils returned; whereas you were never summoned, you may help your selves by an Audita querela, But it is not to be helped upon a reference.

Audita querela.

Reference.

Trin. 1653. Banc. sup.

Arrest of Judgement in an Action upon the Case

A Man brought an Action of the case against one for causing him to be endicted for stealing of a Mare, and hath a verdict against the Defendant. It was moved in Arrest of judgement, that upon preferring of the Bill to the grand Jury, they found an Ignoramus, and so there is a repugnancy in the Declaration, which sets forth that the Plaintif caused him to be endicted, and yet saps that an Ignoramus was found, so that upon the matter it was found no Endictment. Wild on the other side said, the Declaration is well enough, and there is no repugnancy, for the words shall be taken according to the common construction. Hales, There is another Exception. viz. That all the proceedings mentioned in the Declaration are expressed to be before the Judges as Commissioners for the Gaol delivery, and not as Commissioners of Oyer and Terminer. Roll chief Iustice, We will intend that the Endictment was before them as Justices of Oyer and Terminer, and in truth it is not material before what authority he was endicted; and in this case the trouble the party is put unto by reason of this endictment, is the cause of his bringing this Action, and not his Tryal upon it, and therefore the authority is not material; nor is it material whether the endictment be good or no, and the words here are to be construed according to common intendment, viz. That he was endicted though the

Endictment.

Cure.

the endictment was not found, but an Ignoramus, and so by consequence in Law it is no Endictment upon which he could be tryed to come in danger of his life. Hales moved that they might amend the Declaration, and go to a new Tryal. Roll chief Iustice, It would be good to do so, for it is doubtfull how we shall take the matter as it stands before us upon the Record. Amendment.

Trin. 1653. Banc. sup.

The Court was moved for an Attorney of the Common Pleas that was sued in this Court to allow his writ of privilege. But Roll chief Iustice bid him plead his privilege, for we cannot allow it upon a motion, and his shewing of his writ of privilege. Motion to allow an Attorneys privilege of the common pleas.

Whitehead and Buckland

Trin. 1653. Banc. sup.

Hill. 1652. rot. 121.

VVHitehead brought his Action of Tresspas against Buckland for taking of his Cattel, The Defendant pleads the Stat. of limitations of Actions in Bar, the Plaintif replyed that he sued forth an Original within the time limited in the Statute: To this replication the Defendant demurs, and shews for cause, 1. That he saith he hath sued out his Original, but doth not say prout patet per Recordum, as he ought to do. 2ly. He doth not plead the continuances upon the Roll, Maynard answered that the pleading is good, and we cannot take a traverse upon their plea, which is surplusage, nor is it necessary for us to shew in our plea all the continuances, but to plead so much of the Record only as goes in Bar. Roll chief Iustice, The plea is plain, and it is not necessary to allege the continuances, for here is an apparance. Postea. Demurrer to a replication in Tresspas for taking Cattel. Plea.

Sale and Wray.

Trin. 1653. Banc. sup.

VVIld moved the Court that the Defendant in an Action of Covenant might be ruled to swear his plea, because it is a forein and dilatory ples, pleaded to out this Court of its Jurisdiction and to hinder a Tryal; for he pleads that he was at Lisbon in Portugal at the day of the payment of the money which he had covenanted to pay. Roll chief Iustice, you may reply that he was in England, and you need not traverse absque hoc that he was in Portugal. But the question is, whether the plea be forein, and I am of opinion that it is forein, and ought to be sworn. Howell answered, it is not forein, for it may be tryed in the County where the Action is brought. Roll chief Iustice, Let him swear his plea, except better matter be shewn. Motion that the Defendant might swear his plea. Replication. Traverse. Plea.

Kitchinman.

Trin. 1653. Banc. sup.

Arrest of judgement in an Action upon the case.

Upon a Verdict given for the Plaintif in an action of the Case brought for preferring a Bill of Endictment of felony against him. It was moved in Arrest of Judgement, that it was not said in the Declaration to be done falsly, but that the Attorney of the Plaintif hath interlined the word falsly in the Postea. 2ly. It is not said that the Endictment preferred was delivered to the grand Jury, but to the Court. Roll chief Justice,

Endictment.

It is said to be preferred malitiose, and it cannot be malitiose except it be also falsly, and here is falsly expressed in the beginning of the Record, and it is not necessary to say so through the whole Record, for the words subsequent are coupled to the precedent: And a Bill of Endictment is to be delivered to the Court, and the grand Jury receives it from thence. Johnson, Launcelot took another Exception, viz. That there is a variance between the Venire and the Distringas, for in the Venire one of the Jury is called Cargenter, and in the Distringas Carpenter. Roll chief Justice,

Variance.

Let it be stayed for this fault, And let Williams the Sollicitor be committed

Commitment.

for enterlining the Postea; But upon a voluntary confession of the fact, and submission, the Sollicitor was released, and only ordered to pay the charge for the motions in the Cause, and the Postea was ordered to be amended by

Amendment.

the Paper book.

Custodes and *Troos*.

Trin. 1653. Banc. sup.

Motion to stay judgement in perjury.

The Court was moved to stay Judgement in an Endictment of perjury found against one for perjury in an evidence given by him in an Action of Trover and Conversion. The Exception taken was, that the Oath is not averred to be made concerning the matter in issue in the action, so it cannot be such perjury, for which an Endictment lies. Roll chief Justice, Is the Endictment grounded upon the Statute, or is it an Endictment at the Common Law? The Counsel answered, It is an Endictment framed upon the Statute. Roll chief Justice, Then it is a material exception, but if it had been an Endictment at the Common Law it would have been otherwise, for at the Common Law one may be endicted for a

Endictment. Perjury. False Oath.

false Oath in an Affidavit. Therefore let Judgement stay till the Plaintif move.

Custodes and Martin and Long

Trin. 1653. Banc. sup.

Motion to quash two Endictment.

The Court was moved to quash two Endictments against Martin and Long, as Lords of the Mano of Clarkenwell for not repairing the Stocks and Whipping Post, and not making of a Pound. The Exception

Endictments. Stocks. Whipping Post.

was, that the making the Pound was not a publique thing, and therefore an Endictment lies not for not doing it. Roll chief Justice, That is true. And he took another Exception, That the Endictment doth not shew that Martin and Long are Lords of the Leet; And if they be but Lords of the

Mano

Manor, and not Lords of the Leet, they are not bound of common right to repair the Stocks and Whipping Post, and therefore the Endictment must shew how they are bound to do it, viz. either as Lords of the Leet, or otherwise, or else the Parish is bound to do it.

Custodes and Rickaby.

Mich. &c. 1652. Banc. sup.

Upon an old rule of this Court, made in the beginning of King Charls, The Court was moved to deliver their opinion in the Case of Kickaby that had been endicted for murther, and had obtained his pardon, whether the pardon was good and to be allowed, or that he should be tryed notwithstanding his pardon. Roll chief Iustice answered, This Case was argued often at the Bar 8 Caroli, which was long agoe, and before our times, therefore let us have books, and argue it again, for we have yet heard no Arguments in the Case. At another day by rule of Court the Case was again moved, and argued by Wadham Windham for the Keepers, that the pardon was not good, nor ought to be allowed, because by the pardon murther was not pardoned, and in his argument he made these questions, viz. 1. Whether the King could pardon murther by the Common Law. 2. Whether he might do it by the Law of God. 3. Whether he might do it by the Statute. 4. Whether the pardon be made good by the non obstante included in it. For the first, the King ex Officio may pardon Man-slaughter by the Common Law, and in some cases he might pardon murther, viz. Where there is but only malice implyed in the Murtherer, but wilfull murther he could not pardon, because it is against the Law of God, and he cited 12 H. 8. f. 5. Brudenell. By the Law delivered to Noah, shedding of blood was made unpardonable, and that is a perpetual Law, Stat. 13 R. 2. C. 1. The King may delegate administration of Justice to his Ministers, but not dispensation of mercy. By the Statute of 13 R. 2. c. 1. The King was admonished not to pardon murther so generally as he used, but enacted, That if in his pardons he did not expresse the word Murther, the pardon should not be good, and the word Murther is not expressed in this pardon, and therefore it is not good, nor to be allowed, 3 Instit. 236. 8 H. 6. 20. 9 H. 6. 8. Kel. 92. For doth the King in this pardon recite the Endictment it self, for then it may be it might have altered the Case, but only recites the fact generally, and though the words in the pardon be general, and seem to include murther, yet they cannot make the pardon good, because it wants the express word it self, viz. Murther, and although the Charter be not void, yet it cannot be allowed for want of that word, nor can the general non obstante in the pardon dispence with the Statute of 13 R. 2. for all non obstantes are good only where the King takes notice of the Law wherewith he dispenseth. And as to the Statute of 13 R. 2. First, By it the just power of the King is made certain, and ought to be strictly pursued. 2ly. That Statute was made of grace, and as a boone, to the people, in which they have a special interest, and is not to be abridged. 3ly. It was made for the more free administration of Justice, with which the King may not dispence, Hob. f. 214. Here is Lysiars case 11 Rep. f. 88. And although the party here be prosecuted at the sute of the King, yet the prosecution is for the benefit of the people, and therefore the King cannot pardon him, 3 Inst. f. 337. and so he prayed the pardon might not be allowed. Hales appointed by the Judges to argue ad informandum conscientiam, as Windham also was, argued for Rickaby, that the pardon was to be allowed, for the question

Arguments and judgement whether a pardon for murther was well pleaded.

9 Gen. ver. 6.

stion now is not whether the pardon be to be granted or no. And 2ly he held that here is a good non obstante in the pardon to dispence with the Statute, and he argued that murther at the Common Law was pardonable by other words, as well as by the word murther, viz. by the word Felony, and by the word Death of a man, for murther is but Felony in a high degree, and majus et minus non variant speciem, 4. rep. Hoords case, and the Statute of 13 R. 2. makes this clear, and that Statute is dispensed with by the non obstante. For that Statute was not made to disable the King from pardoning murther, but to direct and enform the King, and with that the King may dispence by a non obstante, 16 R. 3. Tit. graunts, 34 & 5 Iac. in this Court, Bakers case. And here is a dispensation by the Statute of R. 2. that this may be said a pardon at the Common Law, for it appears by the words of the pardon, that the King intended thereby to break through the Statute, and to pardon the party what ever his offence was, for although the non obstante do not expres the word murther, yet it is good, for there are equivalent words to murther in the pardon, for the non obstante to dispence withall. As if the King grants a pardon notwithstanding the Statute of Rich. 2. It is necessary to be referred to that clause in the Statute, which is to be dispensed withall, and so is it here, for there is no other end for the King to dispence with the Statute of R. 2. C. 13. but for this clause, and besides here is a special non obstante, and not a general, and for authorityes he cited Stamford 101. pleas of the Crown, 236. and for presidents 31 Eliz. 4 Iac. 5 Iac. 6. Iac. and many others, and said, that he found none against them. Roll chief Iustice, Were it not for the presidents I hold there would be but little question in the case; but some of these questions have been debated in some times, although we cannot question the King for granting such pardons, yet it is questionable whether he may grant them by the Law of God; but the King may do it in some cases, but here is a Statute that sayes he shall not do it, if he do not take notice of the fact in his pardon by the name of murther, and here is no such expression, but the words are general; if the King pardon malum in se with an non obstante it is not good; But let us see Presidents, and we will advise till the next Term. The next Term Roll chief Iustice in the behalf of himself, and the other Judges, delivered the opinion of the Court in this case to this effect. We are all of one opinion, and my brothers have desired me to deliver the reasons of theirs, and my opinion. First I will open the Record, which in effect is this, Rickaby was endicted at Durham for murther, and the endictment was removed into this Court by a certiorari, and Rickaby brought hither by a habeas corpus, and being demanded what he could say for himself, why he should not be adjudged to die, he pleaded the pardon of the late King, which pardons the death of Curtine in very general words; but the pardon doth not expresse the word murther, and in his plea he mentions not the Statute of 10 Ed. 3, by a non obstante, and this is set forth for confirmation of his plea, and the Statute of 13 R. 2. is alleged with a non obstante. The case in brief is, Rickaby and others endicted for killing George Curtine, and brought hither pleads his pardon, as is before expressed. The question is, whether the pardon is to be allowed or not: This case hath been well argued, and the like case with this was never called into question, or argued before this, and therefore if we shall not allow this pardon now, we have better reason to move us to it than others have had to do the contrary, and therefore we shall send him into the Country to receive Iustice there for his offence, for we are all of one opinion, that the pardon is not to be allowed; and that for these reasons, the question here is not whether the King will pardon murther; but Cook saith, the King will not pardon it, if he know it to be murther; but the first questi-

Pardon.

on

on is, whether the King can pardon murder without a non obstante; 2ly. Whether he can do it with a special non obstante. 3ly. Whether he can pardon it by this non obstante in this Charter of pardon. 4ly. Whether Rickaby hath pleaded this non obstante, so that he may take advantage of it. For the first point we do not absolutely disallow the pardon; but we are to enquire whether here be murther or not, if there be murther, that it may be disallowed, otherwise that it may be allowed. The Statute laws were made for preservation of the publique peace, and to restrain pardons for murther, so that after the making of the Statutes, murther could not be pardoned without a non obstante in the pardon, though before it might have been pardoned in general words. And the Parliament hath made divers Statutes to restrain pardons, and that murther should not be so generally pardoned as before. 2 E. 3. 4 E. 3. 14 E. 3. 27 E. 3. C. . by which Statutes it may appear, that the opinion was, that the King could not dispence with the Statutes with a non obstante, and the end of all these Statutes was to enform the King to examine whether the fact he intended to pardon was murther, and that he should not grant a pardon for murther, without expressing the word murther in the pardon, and with a non obstante also, 22 H. 7. 9. Kelway. 8 H. 6. f. 20. 9 E. 4. f. 16. Cook, Pleas of the Crown 226, and so the Law is without a non obstante. 2ly. Whether the King can pardon murther with a non obstante, where the word murther is not expressed. To that I say, that if it had been so, yet the pardon would not have been good, for the Statute cannot be dispensed with by a non obstante, because the Statute was made to reform publique abuses, for the benefit of the Common-Wealth, 11. rep. 8. Cooks Pleas of the Crown, 237. the King cannot pardon a common nusance. 2ly. The King hath bound himself by expresse words in the Statute, and he cannot dispence with them with a non obstante, for then such Statutes made for the advancement of justice would be void, and the King cannot pardon a recognisance for the peace before it is broken, and the King may bind himself in such manner by expresse words, as my Lord Barkleyes case is, with the Statute of 1 Iac. concerning Bishops the King cannot dispence, but with the Statute of 1 & 13 Eliz. he may. Doctor Hutchinsons case, Mich. 10. Iac. C. B. Hob. 103. the King cannot dispence with this Statute, because it was made for the advancement of Justice. For the third point, though the King might dispence with the Statute by a non obstente, yet not with this non obstante in this pardon, for the King doth not take notice of the offence in the non obstante, and the King is deceived here, which the Law will not suffer, and here is a hiding of the offence from the King, which is against the meaning of the Statute. 2ly. This manner of pardoning is against all manner of practise for two hundred years, and was never used till 2 Iac. but only in Spencers case, which was carryed with a strong hand, and allowed only pro hac vice, 21 Eliz. by Popham the Attorney by the special command of the Queen, and untill 2 Iac. for 200. years no non obstante used of the Statute of 13 R. 2. but this is grown up of late years, and a Judge of our own times hath told me that he hath disallowed it. 3. Inst. 105. it hath been used of late times to make a lease of the parties life, viz. to respite execution untill the time of 2 Iac. and that allowance I formerly mentioned pro hac vice, may be questioned whether it were good or no. For the fourth point the pleading of the pardon is not good, for he hath not pleaded a non obstante for the pardon of the murther, but only to dispence with the binding to the good behaviour, and the pardon is only recited to prove the plea, and therefore it is not to be allowed. Therefore let the Prisoner ire sine die, and let the matter be inquired in the County where the fact was done. Yet we will consider whether he shall be

Murther.

Non obstante.

Dispensation.

tryed in the Country or here, in the mean time, Marshall take care at your perill that you keep him in salva custodia.

Newman and Massey.

Trin. 1653. Banc. sup.

Special verdict in debt upon an obligation against a executor. Plea.

NEwman brought an Action of debt upon an obligation against Massey as an Executor; The Defendant pleads generally plene administravit, and after issue joyned he gives in evidence a Judgement against the Testator to make good his plea, upon which a special verdict was found. The question thereupon was, whether this Judgement may be given in evidence upon the late meal Act to maintain the issue, or whether it should not have been pleaded specially in bar of the Action. Roll chief Justice, The question is, whether the giving the Judgement in evidence can stand with his plea of plene administravit, and it seems it cannot, for now you shew an administration in an other way than you pleaded upon a new matter alleged. Adjourned. At another day Hales argued that a plene administravit is a plea in Bar, although it be not a perpetual Bar, and it is a general issue, because it compriseth many things which may be given in evidence, 27 H. 7. 2. 11 H. 6. 35. and it is stiled a general issue, Br. gen. issue 91. & Hob. 106. case f. 227. and it would be mischievous if it should be otherwise. Roll chief Justice, If upon the general issue one should give in evidence non est factum, would it be good? certainly the Act for the general issue in it self is mischievous, and we will not enlarge it, and this is not the general issue intended in the Statute, although it be a common issue, for the general issue intended, ought to be an issue proper to the Action that is brought, and which he might have pleaded at the beginning, and who can tell upon this plea what you will give in evidence, and so the Plaintiff can never be provided for you at the tryal, and therefore you must rely upon your special plea of plene administravit, and not vary from it by shewing new matter. Therefore let the Plaintiff have his Judgement.

Issue.

Evidence.

Atwood and Monger.

Trin. 1653. Banc. sup.

Arrest of Judgement in an Action upon the case.

ATwood brought an Action upon the case against Monger, for causing a false presentment to be made against him before the conservators of the River of Thames, for suffering 8. loads of earth to fall into the River of Thames, and obtains a verdict; the Defendant moved in arrest of Judgement, that it doth not appear by the Record what authority the conservators had to take the presentment, and if they had no authority, then it was coram non judice, and the Plaintiff could not be prejudiced by it. Twisden answered it is well enough, though their authority appears not by the Record, because they have authority given them by the Statute of 13 R. 2. C. 9. which is a generall Law, and ought to be taken notice of; but if not, yet the Action is well brought, for it is brought for the vexation the Plaintiff was put unto by reason of the presentment, and the other matter alleged, is but by way of inducement to the Action, 2 Car. in Dent and Oliffes case in this court so held, and though the conservators had no authority, yet the Action lies for the malitious prosecution, and for unjustly vexing him, and so adjudged. Trin. 16 Car. in this Court in Damon and

Sheremans

Sheremans case. Hales on the other side said, that this Court is not bound to take notice, that the Lord Mayor of London hath this jurisdiction of conservatorship, for the Statute which gave it him is a particular Law touching him only, and so not to be taken notice of without it be shewn, and then if he have no such authority, all the proceedings against the Plaintiff are void. Roll chief justice, An Action upon the case lies for bringing an appeal against one in the Common Pleas, though it be coram non judice, by reason of the vexation of the party, and so it is all one whether here were any jurisdiction or no, for the Plaintiff is prejudiced by the vexation, and the conservators took upon them to have authority to take the presentment. And I hold that an Action upon the case will lye, for maliciously bringing an Action against one where he had no probable cause, and if such Actions were used to be brought, it would deter men from such malitious courses as are so often put in practice. Case.

Sherecroft and Weekes.

Trin. 1953. Banc. sup.

SHerecroft brought an Action upon the case against Weeks, for speaking these words of him; He, meaning the Plaintiff, got Mary Nab with Child, and the Child is his, and I have tryed it with a sieve and a pair of sheeres; It was moved in arrest of Judgement, that the latter words are insensible, and so the Action not maintainable; to which it was answered, that the first words are Actionable, & it matters not though the latter words be nonsence, because they have no reference to the former words, and therefore shall be rejected as senceless. But Serjeant Barnard on the other side said, the latter words do take off the force of the former words, as the case is 4. rep. f. 19. 2ly. It is not said here, when he got her with Child. 3ly. Doth he aver that there was any such person as Mary Nab. Roll chief Justice, The Action doth well lye, for the former words are positive scandalous words, and the subsequent words are not material, and if they be, then they are in confirmation of the former, for it seems he put confidence in the sieve and the sheeres, and that made him speak the words, and it matters not whether his confidence be true or false. Therefore Iudicium nisi pro Querente. Arrest of Judgement in an Action for words. Case.

VVeldon and Strudder.

Trin. 1653. Banc. sup.

IT was moved to the Court that the Plaintiff after he had obtained a verdict, and before Judgement entred, dyed, and prayed that this might be entred upon the Roll; but the Court denyed it, and said it could not be. Motion to enter the death of the Plaintiff on the Roll.

VVhitehead and Buckland.

Trin. 1653. Banc. sup.

THe case of Whitehead and Buckland was again spoken unto, which was this; Whitehead brought an Action of Trespasse by original writ, for taking his Cattel; the Defendant pleaded the Statute of limitations of Actions in Bar; the Plaintiff replies that he took forth an original writ a- Demurrer to a replication in Trespass by Original.

gainſt the Defendant for this Treſpaſs within the time limited by the Statute, and upon this replication the Defendant demurred, and for cauſe ſhews, that he doth not ſhew what writ he ſued forth, as he ought to do, otherwiſe it cannot be known whether he be rightly thereby intituled to his Action or no. 2ly. He hath not ſhewed the continuances upon his proceedings, and ſo it cannot be known whether his Action be diſcontinued or no, that if it be we may take advantage thereof. 3ly. He doth not ſay that he hath taken out an Original, prout apparet per Recordum, as he ought to do, for we do not agree the writ that he pleads he hath taken out. 4ly. He hath concluded his plea, ſo that it amounts to a new aſſignment, and hinders us from objecting againſt it by way of rejoynder, and he joyns an iſſue of his own head of a matter not alleged before, and 5ly. The Action is for a Treſpaſs done in 1645. and yet he concludes it to be contra pacem publicam, which being in the late Kings time could not be, but ought to have been contra coronam et dignitatem noſtram. Latch on the other ſide ſaid, that both parties agree to the Original, and the diſagreement is only in the time of the execution thereof, and it is not neceſſary to ſay prout patet per recordum; nor is it neceſſary to ſhew the continuances of the proceſs, for this would make the Record too long, and here is no hinderance but they may rejoyn if they have cauſe. Roll chief Juſtice, As to the firſt Exception it is not neceſſary to ſet forth the particulars of the writ, and if the writ be not good you may have a writ of Error; and for the ſecond exception, the plea is good without ſhewing the continuances, and there is no inconvenience by not ſetting them forth, and we will intend that all is rightly done, becauſe you have appeared, and you are not hindred from replying, but may do it if you will, and have cauſe, and the Record here ſhews that you have appeared to this writ; but it is not good to conclude the plea ſuper totam materiam as you have done, for by this he is hindred from replying, and then he hath good cauſe to demur, becauſe you have concluded him, and what ſay you to that? Latch, The party may ſtrike out the words Et querens ſimiliter. Roll chief Juſtice, He cannot ſtrike out that which belongs not to him, and you cannot go back, and the other is compelled to demur. Therefore, Nil capiat per Billam niſi, &c. or waive the Demurrer, Poſtea.

Plea. Error. Replication. Demurrer.

Trin. 1652. Banc. ſup.

Who may make a leaſe to try a title.

IT was ſaid in the caſe of Homes and Bingley, that Tenant at will may make a leaſe for years to try a title of land, and ſo may a Copyholder. Q.

Trin. 1652. Banc. ſup.

What plea an Attorney may plead without a ſpecial warrant.

BY Roll chief Juſtice, An Attorney who hath warrant to appear for his Client, may plead for him without warrant. But the Clarks in Court ſaid, he may plead no other plea without a ſpecial warrant, but a non ſum informatus, ideo Q.

Peck

Peck and Ewre.

Trin. 1653. Banc. sup.

Pasch. 1653. rot. 116, or 117.

A Writ of Error was brought to reverse a judgement given in an Action of debt for rent arrear upon two leases for years, viz. upon a lease for 3 years of divers Copphold Lands, and upon a lease for 31 years for other lands. Howell assigns for Error, 1. That the Declaration is not good, because that it is for an entire rent reserved for 2 several terms, whereas one of the terms is expired, & here cannot be made any apportionment of the rent, because it appears not which of the lands are Copphold, and which are Free lands. Roll chief Justice, He ought to shew how much of the lands are Copphold, and how much Freehold Hales, Here is but one entire rent reserved, and it shall be paid as well after the expiration of the Copphold lands as before. Roll chief Justice, Then for what term shall the rent be reserved? for it doth not appear to us, Therefore you were best to discontinue your action, otherwise if we give judgement upon the Exception taken, you may lose your rent.

Error to reverse a judgement in debt for rent.

Discontinuance.

Hill and Dechair.

Trin. 1653. Banc. sup.

An Action of debt was brought for 5 l. for selling of Wine without Licence, and a Verdict was found for the Plaintif. It was moved in Arrest of Judgement, That the Action is not well brought, because it is not by Original, as it ought to be by the Statute of 18 Eliz. Wild on the other side answered, that it is not necessary to be by Original, for a Bill of debt as this is, is in the nature of an Original writ, if it should be otherwise the Statute would be repugnant; for the debt due by Statute may be recovered in this Court by Information, and this is the usual practice of this Court. Twisden took a difference between a penal Action, and a popular Action; A penal Action he said may be by Bill, but not a popular Action. 2ly. It is not shewed that the party was not licensed to sell Wine. 3ly. The Verdict finds him guilty for selling of 5 pints of Wine between such a time and such a time, part whereof was before the Information brought, and part after the Information brought. To the last exception, Roll chief Justice answered, The matter shall relate to the filing of the Bail, for then the Action beginneth, & not before. But what say you to the other Exception? Wild, That is mistaken, for the Action is upon another branch of the Statute. Roll chief Justice, By an original Action it is meant in the Statute that the offence shall not be tryed upon a plaint in an Inferiour Court, & not to distinguish it from an information; for a Writ & Bill is all one in this Court, Stat. 2 R. 3. A Bill is not an Original writ, but an original Action, and it is the common practice to sue in this Court, in this manner. But we will advise. At another day the Court was moved for judgement, because the Action is well brought, though it be not brought by original, and the Case urged of Winston against it is not to the purpose, for that Case was not upon an information, as our Case is, but it was brought by the party grieved to recover his treble damages, and in that case the party did not pursue the manner of suing for them as the Statute direc-

Arrest of Judgement in an Action upon the Statute for selling wine without licence.

Relation. Action.

Writ. Bill.

so, but we have here done it, and it is the constant practice of this Court. Twisden answered, that Winstons case is not answered; for that was a popular Action, as our case is. Roll chief Justice, The question here is, whether there be an original Action or not upon the Statute of 18 Eliz. C. 5. And I say it doth not appear whether that Statute meant to out this Court of its Jurisdiction or not, but it is left at large in the Statute, and me thinks it is an original Action, and Plats Case is, that an original Action may be by Bill, And I conceive the Statute intended only to exclude inferiour Courts, and the constant course is, that the party being in Custodia Marescalli he may be proceeded against by Bill, and we will not suffer this Court to be excluded from its jurisdiction by obscure words in the Statute, Therefore let judgement be for the Plaintif, nisi, &c.

Jurisdiction.

Ricott and St. Iohn.

Trin. 1653. Banc. sup.

Motion that the Defendant may plead as a third person shall direct.

IN Action of Trespass an Ejectment brought by Ricott against St. Iohn, the Court was moved for a third person, that he will save the Defendant harmless, and prays that giving him security so to do, the Defendant may be ordered by the rule of this Court to plead as he should direct him, and that he be not suffered to confesse a judgement. Roll chief Iustice, It is out of the way for you to give such security, for there yet appears no collusion, But you shall be made a party to defend the title, and then move again.

Trin. 1653. Banc. sup.

Where a day is taken inclusive, where exclusive. Arbitrement.

IN the Case of one Clark it was said by Roll chief Iustice, That if the submission to an Award be, that the Award be made six days after the submission, the day of the Award is to be taken inclusive and not exclusive, so that if the Award be made the same day on which the submission was, it is a good Award.

Ayre and Hauxesworth.

Trin. 1653. Banc. sup.

Whether a Traverse well taken.

AYre brought an Action of Trespass against Hauxesworth for his Cattels damage feasant in D. the Defendant justifies in another County, and traverseth absque hoc, that he is guilty in D. or in any other place. The question was whether the traverse be well taken or not. Roll chief Iust. answered, he must take a traverse as this case is, because the justification is local: Therefore let the Plaintif take nothing by his Bill, for he may not discontinue his Action because it is in Trespass. Nota.

Traverse Discontinuance.

Fletcher and King.

Trin. 1653. Banc. sup.

Error to reverse a judgement in debt upon an Assumpsit.

A Writ of Error was brought to reverse a judgement given in the Common Pleas in an Action of debt brought upon an Assumpsit to save one harmless, in disposing of certain goods seised by an Order of the Commissioners of Haberdashers Hall; The Defendant pleaded that he had

had saved him harmless; The Plaintif replyed that he was damnified, the Defendant rejoyns by protestation, that there was no Order of Haberdashers Hall, for plea saith, non damnificatus, and upon this the Plaintif demurred in the Common Pleas, and a judgement was given there upon the Demurrer for the Plaintif. In the writ of Error here the Error assigned was, that the rejoynder is a departure from the plea, and here it doth not appear that Iohn Pitcher named in the replication is the same Iohn Pitcher that is named in the Declaration, for it is said quidam Iohannes Pitcher, and not the said I. Pitcher. Latch said, This is not material, whether he be the same or no; but upon the entire matter it doth appear that he is the same person, for there is an averment afterwards that makes it so appear, viz. That it is the same person and goods mentioned in the plea, and in the condition made upon delivery of the goods, and it cannot be otherwise understood, and their bar is naught both in matter and in form also, for he is to be saved harmless of goods. Hale on the other side makes a difference between saying one I. P. and saying I. P. and saying of divers goods, and saying of goods generally; and the goods mentioned here cannot relate to the goods mentioned in the condition, and though the plea be not good it matters not, for the replication assigns not a breach. Roll chief Iustice, If your plea be not good, then the Declaration is not answered. It may be intended the same person, yet it is not well expressed to say quidam I. P. for how can a traverse be taken upon an intendment? nor doth it appear they are the same goods but by intendment, so that the bar is ill, and the replication also. Affirmetur nisi, &c. Nota.

Traverse. Intendment. Bar. Replication.

and Hodges.

Trin. 1653. Banc. sup.

A Writ of Error was brought to reverse a judgement given in the Town of Newbery in an Action upon the Statute of 5 Eliz. brought by an Informer for using a Trade, not having served an Apprentishiip therein, and two Errors were assigned, 1. That the Action ought not to be brought in an inferiour Court, but must be brought in one of the Courts at Westminster. 2ly. The Venire is not good, for it is only præceptum est, and doth not say per curiam as it ought to be. Roll chief Iustice, The Action ought not to be brought there, but it ought to be brought in some of the Courts here and the second is a good exception also, therefore reversetur, nisi, &c.

Error to reverse a judgement given in an Action upon the Statute of 5 Eliz. Action. Venire.

Tayler and VVebb.

Trin. 1653. Banc. sup.

IT was resolved by the Court, that the delivering of a breviat of the Case to the Jury before the verdict, and their reading it, did make the verdict given by them to be void, for the Jury ought not to have any other writings given them to peruse than such as are given in evidence, for it would be dangerous if it should be otherwise, and to confirm this, Mich. 31. et 32 Eliz. Metcalfs and Deans case, and one Viccary and Farthings case were cited by Roll chief Iustice.

What Act may make a Verdict void.

Ash-

Ashby and Child.

Trin. 1653. Banc. sup.

Mich. 1652. rot. 686.

Upon a Demurrer in an Action of debt the case was this, A man died intestate, and a Stranger possesseth himself of the Intestates goods after Letters of Administration were granted to a Creditor of the Intestate, who brings an Action of debt against the Stranger for the debt due to him by the Intestate, as Executor of his own wrong. The question was, whether the Creditor by taking the Letters of Administration had not suspended his Action for the time he should continue to be Administrator: Twisden held that his Action is suspended, and cited 8 Rep. St. Johns case, because the goods of the Intestate shall be assets in his hands, Hob and Longs case; and the Plaintif is at no prejudice, for he may recover the goods by an Action of Trover or Trespass, 12 H. 4. f. 21. Hales on the other side held that the Action is not suspended; for though he may bring Trespass or a Trover and Conversion for the goods, yet they are not assets till they are recovered, and a Creditor may bring an Action against an Executor de son tort, although Letters of Administration be granted to another, and the subsequent administration doth not suspend the Action which accrued before, and here can be no retainer to satisfie himself, because he hath not the goods, and it is not the bare Letters of administration that chargeth the Administrator, but the Assets also, Com. 7. Bassets case, An Action of debt is maintainable by an Administrator who hath not assets. Roll chief Justice, There is a book against that, that the heir is not chargeable. Hales prima facie, It is a good plea, otherwise it would be mischievous, for all the goods may be wasted before he hath administration granted him; and though he may bring an action of Trespass for the goods, yet he may bring his Action to which he was intitled before the administration granted unto him. Roll chief Justice, It is clear the Administrator may bring a Trover and Conversion for the goods, and here is but a right to assets in the Administrator, and no assets to charge him withall, and it would be mischievous if it should be otherwise; and the granting unto him Letters of Administration hinders him not from bringing his Action, because the goods were not taken away after the Administration granted but before, and if they had been taken away afterwards, he might have had a Trover and Coversion, or an Action of Trespass, but in the case at the Bar he may have an Action of debt, and he cannot sue himself. therefore his Action is not suspended, and he cannot retain the goods to satisfie himself, because he hath no goods, and he may sue the heir here if he will, and he shall not take advantage against him by reason of the administration, because he hath no assets to retain or sue himself for, and so it is in his election what Action he will bring, otherwise it would be dangerous, and we must support men in their just Actions. Jerman, Nicholas and Ask ad idem. And so judgement was given for the Plaintif, nisi.

Trover and Conversion.

Assets.

Trespass. Debt.

Suspension. Retainer.

Election.

Fisher

Fisher and Ieoffryes.

Trin. 1653. Banc. sup.

FIsher brought an Action of debt against Ieoffryes as Executor to another; the Defendant imparls, and after imparlance he pleads that he is Administrator cum testamento annexo, and not Executor, and that he ought to be named so in the writ, to this Plea the Plaintif demurred. Roll chief Iustice, Upon the matter he pleads a misnomer after imparlance, which he cannot do, and therefore let the Plaintif have his judgement, nisi, &c. What may not be pleaded after imparlance. Plea.

Giles and Southward.

Trin. 1653. Banc. sup.

IN this case it was said by Roll chief Iustice, That if the Defendant doe plead an insufficient bar, and the Plaintif do joyn issue upon it, and obtain a Verdict, the Plaintif shall have judgement though the Bar was not good. Iudgement though the plea in bar not good.

Rawley and Vivers.

Trin. 1653. Banc. sup.

A Writ of Error was brought upon a judgement given in an Action of Trespass, quare clausum fregit, &c. The Error assigned was, that the Plaintif did declare quare clausum fregit, and for pulling down of his house, but doth not shew the value of his house. Roll chief Iustice, It is not necessary, the Action being a real action. Affirmetur, nisi. Error to reverse a judgement in Trespass quare clausum fregit. Value.

Bariar and Windham.

Trin. 1653. Banc. sup.

IT was held by the Court that the Engagement taken before 2 Iustices of Peace in Ireland is well taken, and that the Engagement ought not to be pleaded to an Alien born, and subject to any forein Prince in amity with England, because he is under another obedience, and thereupon the Engagement pleaded to such an one was discharged in the Case of one Bariar and Windham. What engagement is well taken.

Trin. 1653. Banc. sup.

ONe who was a witnesse in the cause for the Defendant being bail for him, upon motion to the Court was taken off from the file, and another bail taken in his room in Court upon examination of his sufficiency. Nota. Who may not be bail.

Trin. 1653. Banc. sup.

Motion to dispauper the Plaintif.

THe Court was moved to dispauper the Plaintif in an Action of Trespass and Ejectment, for that it was proved by Affidavit that he was a very vexatious person, for he had been thrice nonsuit in this Action, & would never pay costs, or make a sufficient Lessee able to pay them, and had also sealed a general release to the Defendant. Roll chief Iustice, Let him be dispaupered, and let him put in an able Lessee to pay the costs, or otherwise he shall not proceed in his Action.

Trin. 1653. Banc. sup.

Laws of England and Ireland all one. Error.

BY Roll chief Iustice, The Laws of Ireland are all one with the Laws of England, and a writ of Error lies in England to reverse a judgement given in Ireland.

Trin. 1653. Banc. sup.

What is not good notice to a prisoner of a declaration against him. Iudgement discharged.

A Declaration was filed in the Ofice against one in custody of the Mareschal, and a Copy of it was left with the Clark of the prison, but the prisoner had no notice of it. Upon the prisoners shewing of this matter to the Court, and reading an Affidavit to prove it, a judgement by a nihil dicit obtained against him was discharged, and ordered that the Plaintif should accept of a plea.

Trin. 1653. Banc. sup.

To discharge a prisoner that had long lain in prison.

THe Court was moved to discharge a prisoner out of the Upper Bench that had lain there ever since 24 Caroli, upon a judgement obtained against him in an Action of Debt, where only common bail was filed, and because no execution was ever taken out upon that judgement, and the Plaintif in the Action was now dead. Roll chief Iustice, Let him be discharged nisi causa shewed to morrow. Nota.

Trin. 1653. Banc. sup.

Matter of Record not alterable without motion to the Court.

BY Roll chief Iustice, A matter entred upon Record cannot be altered without a motion made, and the Consent of the Court first obtained, though the Attorneys on both sides consent to it.

Trin. 1653. Banc sup.

To quash an Order of Sessions.

THe Court was moved to quash an Order of Sessions for one to pay 3 s. a week to keep a Bastard Child. Roll chief Iustice, Let it be quashed, for they can make no such Order, for the party may keep the Child himself, if he will, and then he need pay no money to keep it.

Trin.

Trin. 1653. Banc. sup.

BY Roll chief Justice, The Venue cannot be changed after a Plea pleaded in abatement of the writ, much lesse after a plea pleaded in Bar. Q. When the Venue may not be changed.

Fanshaw and Bond.

Mich. 1953. Banc. sup.

IN this Case it was said, That if a Copyholder refuse to pay a reasonable fine, or to be admitted to the Copyhold, This is a forfeiture of his estate. How a Copyhold is forfeited.

Dekin and Turner.

Mich. 1653. Banc. sup.

VPon a motion in Arrest of Judgement in an Action upon the Case for these words, Thou art a whore, and I will prove it, It was said by Roll chief Justice, That the words are not actionable, although spoken since the Act made against Adultery, because they are but words of heat and choler, but if a special damage be laid by the speaking of them, as per quod maritagium amisit, or the like, there they are actionable. Arrest of judgement in an Action for words.

Price and Goodrick.

Mich. 1653. Banc. sup.

IN this Case it was said by Roll chief Justice, If there be a Judgement against three, and one of them is taken in Execution, and be afterwards set at large by the Plaintifs consent, if any of the other two be afterwards taken in execution upon the same Judgement, he may have an * udita querela, but he cannot be relieved upon a motion in Court, though grounded upon an Affidavit. Where an Audita querela lies.

* Motion.

Newton and Osborn.

Mich. 1653. Banc. sup.

NEwton brought an Action of Covenant against Osborn an Executor to a Lessee for years for non-payment of rent reserved upon the lease upon the general words yielding and paying in the lease; there being no express Covenant therein for the payment of the rent. The question was, whether this Action did lie against the Executor. Latch argued that it did not lie, because it is a meer Covenant in Law comprised only in the words yielding and paying, and not an express Covenant, and so only binds the Testator, but not the Executor. But Roll chief Justice answered, That an Action of Covenant doth lie against an Executor upon a Covenant in Law, although he be not named, but it is otherwise of an heir, for he is not bound by such a Covenant. And the reservation of the rent here doth seem to be an express Covenant, for it is the agreement of both parties, viz. of the Lessor and Lessee, Iudicium nisi. Whether an action of Covenant did lie or not against an Executor. Covenant. Executor.

Benskin and Herick.

Mich. 1653. Banc. sup.

A Plaintiff lost his mony by joyning false issue, a Verdict against him.

BEnskin brought an Action of Debt upon an Obligation against Herick. The Defendant pleads that he tendred the mony due upon the Obligation at the day and place of payment, and that the Plaintiff refused to receive it. Upon this the mony was brought into Court by rule upon the Defendants motion, the Plaintiff joyns issue that there was no tender and refusal; and upon this a Tryal was had, and a verdict found for the Defendant, that he did make tender, and that the Plaintiff did refuse to receive the mony, and thereupon the Defendant moved to have the monies out of Court. Roll chief Iustice, The Plaintiff hath lost his mony by this verdict, therefore let him shew cause why the Defendant should not have them, for it is peremptory to the Plaintiff.

Peremptory.

Franklin.

Mich. 1653. Banc. sup.

Motion for Merchants to be joyned to Auditors assigned to receive an accompt.

IN an Action of Accompt the Defendant was adiudged to accompt, and Auditors were assigned. The Court was moved that they would order to joyn some Merchants to the Attorneys on either side to help them to mannage the Accompt, because the Attorneys were not skilfull in such businesses. Roll chief Iustice, We can make no rule for this, but you may by consent advise with Merchants to assist you in drawing up the Accompts,

Mich: 1653. Banc. sup.

One burned in the hand may be a Witness.

BY Roll chief Iustice, one that hath been burned in the hand for Felony, may notwithstanding be a witness in a Cause: for he is in a capacity to purchase Lands, and his fault is purged by his punishment.

Townsend and Barker.

Mich. 1653. Banc. sup.

Trin. 1653. rot. 743.

Arrest of judgement in an action for words.

TOwnsend brought an Action upon the Case against Barker, that had been a Copartner with him in trade, for speaking these words of him, You are a cosening Knave, and did cosen me of 1200 l. at one time, and that was in making an accompt in the year 1648. Upon a verdict for the Plaintiff, it was moved in arrest of Iudgement that the words are not actionable, because though they be spoken of a Tradesman, yet they are not spoken of him in reference to his Trade, but in reference to an Accompt: and although by way of reduction and consequence they may reflect upon his honesty, yet they are not actionable, and though his reputation be impaired by speaking them, yet he cannot be endited for cosening in his Trade by reason of them, because they are spoken of a singular and particular abuse, and not of a general cosening used in his Trade, and an Action upon the Case lies not for words which are only scandalous by way of reduction, and if the words should hinder the party

party to get a Partner hereafter to trade with him, yet he may use his Trade, and so cannot be prejudiced: nor are the words that he cheated him, but that he cosened him, which are not of so violent a construction. Wild on the other side said, that here is a Partnership which is necessary to the driving of a Trade, and without which it cannot be so well driven, and the Accompt is incident to all Partnerships, and prayed for Judgement. Roll chief Justice, If the Copartnership continued, the words were actionable without doubt, for then they must be spoken of him in the way of his Trade: but here the Partnership being ended makes the matter more considerable: but yet as it is the words are scandalous, and may hinder him from getting a Partner for the time to come, and it may be he cannot mannage his Trade without a Partner; and although an Accompt be a private thing, yet the Plaintiff is disgraced by the speaking of the words, and none will deal with a man that will coseu his own Partner; and we must countenance Trade and Traffique, and mens credits; and the Accompt is not so collateral a thing to trade as Hales objects, as is the hiring of a shop to trade in, or the like. German Justice ad idem, and said, that Copartnership is necessary to support Trade, and the keeping of a true Accompt is the principal thing between Partners. Nicholas and Ask Justices ad idem. Judicium nisi pro querente. Case.

Bird and Christopher.

Mich. 1653. Banc. sup.

IN this Case upon giving of an evidence in a Trespass and Ejectment, it was said by Roll chief Justice, that if I do enfeoff I. S. with a Proviso contained in the Deed, that it shall be lawfull for me to revoke this Feoffment, and afterwards I levy a fine to I. S. of the same Land, this is an extinguishment of the Proviso of revocation. Extinguishment of a Proviso in a Deed.

Olive and Tong.

Mich. 1653. Banc. sup.

Trin. 1651. rot. 1426.

UPon a special Verdict in an Action of Trespass and Ejectment, the Case in effect was this, One whose Sirname was Mills seised of Gavelkind-lands in Kent in fee, by his last Will and Testament devised these Lands to Elizabeth his Daughter in tayl, with a Proviso in the Will, that if his Daughter Elizabeth did marry one of his own Sirname that then she should have the Lands in fee-simple. Elizabeth maried one whose Sirname was Mill, but commonly called and known by the name Mills also. The question was, whether she had maried one of such a Sirname, whereby according to the Proviso in the Will she had a fee-simple in the Lands devised unto her, or whether his Sirname should be accompted a distinct name from the Testators, so that Elizabeth by the Will could only have an Estate in tayl in the Lands devised unto her. It was argued first, that the name Mill and Mills shall not be said to be one and the same name, no more than if she had maried one of a clear differing Sirname in sound, yet commonly called also Mills, could she have been said to have maried one of his own Sirname, and the Proviso here is not a particular pointing out of the person whom his Daughter should marry, but a general limitation Special Verdict in a Trespass and Ejectment.

directing her to marry one of his own Sirname, and this ought to have been punctually followed, because the name was used to induce the affection of the Devisor to enlarge the estate given by him. If he had devised his Land to his Daughter E. if she shall marry a Protestant or an Earl, she must marry one that is really so, and not one called or only reputed so. And as to the objection, that this construction would make contrariety in the Will, which is not to be admitted; this will not be, if the Will be taken compositive as it is penned, or together, and not abstractive and taken to pieces, and if it should not be intended that she should marry one who in truth was of his name there would be a contradiction in the Will; and here is an Emphasis in the word Own, which must be meant his real name, and not of a reputative name. Roll chief Justice, If a Juror be returned by the name of Mills, and is sworn by the name of Mill, shall this be a mistrial, quasi non? and the words found alike as Baxter and Backster. At an other day the Case was put again by Hales, and argued for the Plaintiff, and he made divers points in the Case, but I could not well hear him: but the only point insisted on was the point formerly spoken to, and the sum of his Argument was, that we are in this Case upon the construction of a Will, which must be favourably taken, and the variation here betwixt Mills and Mill is small and inconsiderable to defeat an Estate, for it is only in the termination of the word, and is as little as the difference between Baxter and Backster, or Hasting and Hastings, 9 E. 4. 42. 44 Eliz. Molyn and Molyns, or Pitt and Pitts, which differ but in one letter, and is not a material difference. 2ly. It appears by the Verdict that he was commonly called Mill and Mills, and common reputation we know doth give names to things. 3ly. It is found that he was known by one name as well as the other, and this will satisfie the Testators intent well enough to carry the Estate. 4ly. The party himself was known to the Testator at the time of the making of the Will by the name of Mills, as appears in eight several places of the Will. And if one devise Lands and Goods, and excepts one Lease, if there be other Leases they are devised. 5ly. It appears by the Will and the Verdict, that the marriage was intended by the Father with this very person that is called Mills, and a settlement of Lands made upon it, and it shall not be intended that the Testator thought that this marriage would be dissolved and another marriage be had. And the devise in the body of the Will doth not make the Proviso in the end of the Will repugnant, but if it did the last repugnancy shall stand: for here is no dependancy of the last Proviso upon the other part of the Will, but it is a substantive clause which revokes not the other, Doctor Buts Case, 10 Rep. and this shall be counted his last Will, and it is the more strong, because it appears by the very words, that it is a plain substantive clause made to declare the new intent of the Testator, and it shall not be intended that this Proviso shall be applyed to another person, although there be a particular title given to him by the Will, and the Estate altered by the Proviso, and the former devise is derogated by it, Hob. 28. Case, Hardings Case, and the strength of the Proviso to have one of the true name of Mills is not to be intended, for it appears that the intent of the Testator was, to have one of his name in reputation, and this appears by the former limitation in the Will, and the provision made in the last Proviso to preserve his name, is no more than that he had done before: and the former limitation is as well for the Testators advantage as the latter Proviso, and more, and his intent was not to sell the Lands, but to preserve them, and it is no more to say of my own Sirname, than to say of my Sirname, nor is the videlicet any thing to the purpose. Roll chief Justice, if the question were only upon the Proviso, there would be no difficulty but that Mill and Mills should be all one, and it would

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be good in a Conveyance also, as I suppose, and if it were apparent that he intended one and the same person, then the last Proviso would be good to revoke the former part of the Will: but the doubt is, whether he intend the same person or not, because he makes such an alteration of the Estate by the Proviso, and puts these words mine own name in it, by which it seems he intended to advance his own name, and he seems exact in it by the great alteration of the Estate made by the Proviso in the settlement of the Estate. Proviso.

At another day the Case was again moved and argued by Wadham Windham, that Mills & Mill are both one name, and differ but in sound, as Abacock & Habacock, and the Verdict finds that both the names are his true Sirname, though it could not be so in Christian names, 6 Rep. 66. Sirnames are altered by time and Custom of places, and being so altred do become true names, as the name of Cromwell is now become a true name, though antiently the name was Williams; but I agree, that Christian names cannot be altered by time, no more than things can be altered from one thing to another. 3ly. By the construction of the Will, and by the finding of the Verdict, the names are made one name, although by the Testator he was known by no other name than the name of Mills, for he is so called, and this answers the Proviso in the Will, that he should be of his own Sirname with whom his Daughter was to mary. 4ly. Here is a particular devise made to her in the body of the Will of the Lands, if they should not be devised here, 8 Rep. Clausa generalia non extendunt ad ea quæ sunt specialiter recitata; and there is a difference between a Will and a Deed, for all the words in a Deed are spoken together: but it is not so in a Will which is ambulatory, and may have several constructions, and one clause may controll another, Instit. 112. and the Proviso here in the last part of the Will controlls the former part of the Will, as a Codicil might have done, if there had been any, and the very words express the parties meaning, 1 Rep. Porters Case, Dyer 255. If in a Will a clause may receive a doubtfull construction, then a verbis non est recedendum, nor shall there be a particular supplyment of words added to expound it, except to prevent an absurdity, which must not be admitted, though in a Will. Maynard on the other side made two questions. 1. Whether Mills and Mill should be intended to be one and the same Sirname, and so to be the Testators Sirname. 2ly. Whether Elizabeth take the Lands by the first clause in the Will, or by the Proviso or latter clause. For the first he held, that Mills and Mill is not one and the same Sirname, because the Testator had a particular eye to his own true Sirname, and the Cases put of names that differ, yet sound alike, do not come to our Case, because there was no such special eye or regard as here is. 2ly. Suppose that his true name be Mills, and that he is provided for particularly by the Testator in his Will, then the Proviso cannot extend to him, for this would be senseless, and it is as much as to make the Testator in one breath to speak contradictories, and it would be hard to make such constructions of such words that would argue the party to be irrational that spake them, and the words in the Proviso are in nature of an exception in construction of Law, 12 Ed. 1. Fitzh. Grants 87. and Carter and Ringsteeds Case is not yet answered by the other side, Bolton and the Lady Staffords case, 8 Iac. C. B. 1. rep. Mildmayes Case. The words in a Proviso in a Will or Deed may be supplyed with other words, rather than to interpret it so, that it shall contradict the former part of the Will or Deed where it is, and by the construction that we make of the Proviso all the Will may stand together, but by another construction it cannot. Elizabeth shall have a special entayl with her Husband by the last clause, and yet the general Estate tayl given in the former part shall stand; and we are in the interpretation of Wills to consider circumstances and conjectures, and there are two publications found in this Will,

will, although this doth not appear upon Record, and so comes not in judgement. Roll chief Iustice, We are all of one opinion, that judgement ought to be given for the Defendant. If the first clause in the Will continue uncontrolled by the Proviso, it is for the Defendant, but if it continue not uncontrolled it is for the Plaintif, and we hold that the first clause is not controlled, for we ought not to make any part of a Will void, if all the parts of it may stand together, and this cannot be here if the Proviso should controll the former part, and to make it repugnant, but if the Proviso could stand with the former part of the Will it might revoke the former part, and if this Proviso had been made after the Will, it might have altered the Case, but that appears not; And we must collect the Testators meaning by the Will, and by the Will it cannot be understood that the Proviso should be void, and the common reputation of Mill and Mills to be the same name, shall not make Mill to be the Testators true Sirname, and the Testator intended his Daughter should marry one of his own true Sirname, and not one of his reputative name, for this is a special case, and goes not according to the ordinary rules of names that sound alike, and it cannot be intended that the Testator did mean to destroy one part of his will by another part. A general clause in a grant shall not extend to a particular thing provided for in the grant, much less shall it do so in a Will. I therefore let judgement be for the Defendant, nisi.

Revocation.

Intention.

Mich. 1652 Banc. sup.

Arrest of Judgement in an Action for words.

AN Action of the Case was brought by one that kept a Victualling house, for speaking these words of her, There was a man killed in her house, and she concealed the murther. Upon a rule to stay judgement till the Plaintif should move; Wild moved for judgement, because he held the words to be actionable, in that they amount to a scandal of the Plaintif, as well as they tend to cause her to be fined and imprisoned. Roll chief Iustice, She shall not be fined and imprisoned except she receive and comfort the party that killed him, but the words are scandalous, and the Case differs from the Cases put on the other side. Twisden for the Defendant urged, that it was not averred that the Plaintif did know of the murther. Roll chief Iustice, The words imply she knew of the murther, for how else could she be said to conceal it. Bowlstrode for the Defendant said, That it doth not appear by the Record that any man was killed in the house, nor any time when, nor is it said the Defendant spoke the words of the Plaintif, but only by an innuendo. Roll chief Iustice, The words are actionable to say that thou hast murthered a man, without averring that he is killed; but if it appear by the Declaration that the man was alive after the words spoken, it is otherwise; And here if no man be murthered the feigning of a false thing makes the words the more actionable, by saying she concealed a murther, where there was in truth no murther done; But the greatest doubt here is, Whether because admitting a murther were done, the Plaintif is to be but fined and imprisoned for the concealing it, the words can be actionable; And I hold they are actionable notwithstanding, because they are scandalous; and he said that in an Endictment, a thing must be expressed to be done falso et malitiose, because that is the usual form, but in a Declaration those words are not necessary. Therefore let the Plaintif have his judgement, nisi.

Fine. Imprisonment.

Case.

Indictment. Declaration.

Mich.

Mich. 1653 Banc. sup.

IT was held by the Court that a Constable cannot be sued out of the County where he is Constable for a thing done by him in execution of his Office; but for other matters he may. A Constable not to be sued out of his County.

Elston and Drake.

Mich. 1653. Banc. sup.

ELston brought an Action of Debt for rent due upon a lease for years, as being Administrator to I. S. and declares for rent due since the death of the Intestate, and hath a verdict and a judgement in the Common Pleas. Drake brings his writ of Error here to reverse this judgement. The Exception taken was, that it doth not appear by the Declaration whether this rent sued for doth belong to the Administrator or not, for he makes himself no title to it; and for ought doth appear it may belong to the heir and not to him. Wadham Windham on the other side, This is no Exception now after a Verdict, but if it had been upon a Demurrer it would have been good, and we do not declare that the Intestate was seised in fee who made the lease; and so it may well be understood, that he had but a lease of this land, and did let an under lease to the Defendant; and the better construction shall be made for us. Hales on the same side said, non detinet is pleaded, and the Jury hath found detinet; which would be impossible if the Intestate had been seised in fee, and there is a double intendment that the rent is reserved upon a lease, for it is reserved to Executors, and not the heir. Maynard on the other side said, the Verdict helps nothing, because the Declaration is naught in substance in our case; for the Plaintif therein hath made himself no title to the rent, and all that is in the Declaration to intitle him is expressed but by way of inference or conclusion, and for the reserving the rent to the Executors, this had been good if the rent had grown due during the time of the Intestate. The Court moved the parties, that by consent the Declaration might be amended, paying costs, and that a new tryal might be had by consent, which was agreed unto, and so ruled. Error to reverse a judgement in debt for rent. Amendment. Tryal. Costs.

Bedwell and Fenwick.

Mich. 1653. Banc. sup.

BEdwell brought an Action upon the case against Fenwick, and declares that the Defendant, in consideration that the Plaintif would marry E. his Sister, he would give his Sister 300 l. for her marriage portion, upon his marriage with her, and for breach of this promise brings his Action, and obtains a verdict against the Defendant. The Defendant in Arrest of Judgement urged, that the breach assigned in the Declaration was not well assigned, for it recited another promise than upon which the Plaintif had declared, for he declares of a promise made to give 300 l. in marriage to the Plaintif with his Sister E. and he assigns the breach in not paying the 300 l. unto the Plaintif, so that the breach doth not answer the promise, for if the money be paid to the wife, which for ought appears may be, the promise is not broken though she be married. But Hales on the other side said, that it is all one as it is alleged, and that it is equivalent and reciprocal; Arrest of judgement in an Action upon a promise.

cal, and here is a refusal to pay the money, assigned for a breach, and this is a good breach. Roll chief Justice, I suppose it is all one as if he had expressed the very words of the promise, for the Husband is to give the acquittance for the money, and the moneys are to be paid unto the Husband, and the Verdict finds that they are not paid: And if moneys be due to a Feme upon a Contract dum sola fuit, and after, and before the payment thereof she marry, the moneys are to be paid to the Husband, and not the wife, and the moneys here are intended to be paid for a marriage portion, which doth properly belong to the husband, and they were not to be paid unto her before the marriage, and it is all one in this Case as if the Plaintif had said, that the Defendant had not paid the moneys to the Husband with his Wife in marriage: Curia ad idem, The Rule thereupon was, that the Plaintif should take his judgement, nisi.

Acquittance.

Payment.

Hicks and Joyce.

Mich. 1653. Banc. sup.

Arrest of judgement in an Action for words.

AN Action of the Case was brought for these words, She, meaning the Defendant, is a whore, and I will prove it, and her plying place is in Cheapside, and she gets 40 s. a night by playing the whore. It was moved in Arrest of Judgement, that the words are not actionable, because they are but words of choler, and very general words, and may receive divers constructions, and at the first moving the judgement was stayed; but the matter being moved again at another day, Roll chief Justice said, that these words import more than the bare calling of a woman whore, by reason of other particular circumstances set forth to aggravate the matter, and therefore let the Plaintif take her judgement.

Townesend and Barker.

Mich. 1653. Banc. sup.

Trin. 1653. rot. 743.

Arrest of judgement in an action for words.

AN Action upon the Case was brought by a Churchwarden of a Parish, for these words spoken of him, Thou dost make Lowns (i.e. taxes or assessments) thy self, and makest 5 quarters in the year, and dost cheat and cozen the Parish. It was moved in Arrest of Judgement that the words are not actionable, because they are spoken of a Churchwarden, which the Common Law takes not notice of: And 2ly. In that it doth not appear they were spoken of him in relation to his being a Churchwarden; But it was answered, That a Churchwarden is an Officer of Trust, and taken notice of by the Common Law, and so was it adjudged in Stroade and Homes his Case in this Court, and the words must be intended to be spoken of him in the relation to his Office, for that is implyed by his making of Lowns and his couzening the Parish. The rule was for the Plaintif to have his judgement.

Mich. 1653. Banc. sup.

Endictment quashed. Addition.

AN Endictment of one endicted for refusing to serve in the Office of a Headborough was quashed, because it did not shew that he was chosen to the Office, and because the party endicted wanted an addition.

Mich.

Mich. 1653. Banc. ſup.

The Court was moved to diſcharge one Cullins, that was arreſted as he was attending the Court to give teſtimony as a Witneſs in a Cauſe, and for an attachment againſt the parties that did arreſt him. German Iuſtice abſente Roll chief Iuſtice, Take a Superſedeas, and let the parties ſhew cauſe why an Attachment ſhall not be granted againſt them that arreſted him.

To diſcharge one arreſted attending the Court as a Witneſs.
Superſedeas.
Attachment.

Hanſlop and Johnſon.

Mich. 1953. Banc. ſup.

The Court was moved to change the venue in an Ejectione firmæ laid in London, becauſe the Lands in Queſtion did concern the Poor of London, and therefore it was ſuppoſed there could not be an indifferent Tryal in London, for by conſequence in that it concerns the Poor, it concerns the whole City. But Roll chief Iuſtice anſwered, the Action is local, and it cannot be removed, except you can draw it from thence by your Plea.

To change the Venue in an Ejectione firmæ.
Action local.
Venue.

Boyle and Scarborough.

Mich. 1653. Banc. ſup.

Hill. 1652. rot. 226.

An Action of Debt was brought by Boyle againſt Scarborough, wherein the Plaintiff did declare, that the Defendant in conſideration that the Plaintiff would forbear to ſue forth a ne exeat regnum againſt the Defendants Son, who did owe unto the Plaintiff five hundred pound, did aſſume and promiſe unto the Plaintiff a certain ſum of mony expreſſed in the Declaration, upon non aſſumpſit pleaded, and a verdict and a judgement given for the Plaintiff, the Defendant brought a Writ of Error, and it was aſsigned for Error; That there appears no conſideration to ground the promiſe upon, & ſo no ground of Action, for he doth not ſhew that he had done any thing in proſecuting the Writ of ne exeat regnum, and Roſyer and Langdales Caſe 1650. in this Court was cited, and Hob. 216. Bedwell and Cottons caſe, and there is no ſuch Writ in the Regiſter, as a ne exeat regnum, and therefore there could be no forbearance to ſue out ſuch a Writ, but there is a Writ to give ſecurity not to go out of the Realm to the publique prejudice of the King and his people, and here is no ſuch matter expreſſed, but only that his Son owed him 500 l. & Nat. Brev. 85. was agreed; and it was farther objected by Wild who argued againſt the Judgement, that though the conſideration ſhould be good, yet the replication is not good and ſufficient to tye the ſecond Writ to the firſt: for it is not ſaid that the ſecond Writ is pro una & eadem cauſa, and ſo it is incertain, Br. Treſpaſs 85. 9 H. 6. and there may be ſeveral promiſes made in one day; and if the replication is good, yet the reſponder is not good, 19 H. 8. 43. for he only admits, that he being a Knight is the ſame perſon which was ſued by the name of Eſquire, Hob. 171. Stukelyes Caſe And here is a judgement by a Nihil dicit; and no warrant of Attorny, for it is in Latin, and ſo it is nul, it being ſince the late Act made for the proceedings in Law to be in

Error to reverſe a judgement in Debt upon a Promiſe.

English. Latch on the other side prayed that judgement might be affirmed, and said, that here was a good consideration to ground the promise upon, for there is a Writ of ne exeat regnum, and any one may move for it, and it is a benefit to the party, that the Plaintiff will forbear to sue it forth, and he had cause enough here to move for this Writ in order to recover his debt, and although it be in the discretion of the King, whether he will grant it or not, yet it is for his honor to grant it, and the Register 193. 134. and Brit. 102. make mention of this Writ, Inst. 130. There is a caution used to be taken of parties licensed to go beyond Seas, that they shall pay their debts. 2ly. The replication is good, for it is not necessary to say, that the second original sued forth is for the same cause that the former was, because it is in an Action upon the Case set forth at large, which shews verbatim that it is for the same cause, and so it is plain in it self. 2ly. It is said, that he sued out the second Original pro causa prædicta, which is a sufficient averment, if there needed any, and the variance in the dammage is no argument that there is another cause of Action, for when the second Original was sued forth, the dammages were encreased by the encrease of the time, being a whole year afterwards. For the rejoynder, it is to be considered, 1. whether the party be estopped. 2ly. If not, whether the matter set forth be good. For the first he held, that he is estopped by his comming in formerly gratis as an Esquire, and being not brought in in custody, for Dyer, 192. there he shall not plead another name: but here this is not alleged as it ought to be, for he ought to have concluded absque hoc, that he is an Esquire, but he hath affirmed himself to be an Esquire, by saying of prædictus, &c. and he ought to have alleged this specially, viz. that Richard Boile Knight, which was sued by the name of Richard Boile Esquire; and the Book 2 E. 4. f. 3. is against the other Books, and the Law is otherwise, and the old Book of Entries, and other Presidents which are against me, they passed sub silentio, and the Law generally is against these Presidents, Rastal Brief. 54. 19 H. 6. 1. 36. 44. say, that he is estopped if he so come in, and so is Br. Tit. Defence, 15 & 26. 32 H. 6. 3. 35 H. 6. and many other Books; and the Book of 19 H. 6. 43. urged on the other side is against them; and though he should not be estopped, yet we can take advantage of the first Original, for it is but abateable by the Plaintiff, and is not abated, and there is a flaw in the rejoynder, for he ought to have traversed that he was not an Esquire. And 2ly. the 26th. of March is after the Original sued forth, and it is uncertain as to the time when he was a Knight, Plowd. 37. by Morgan 7. H 7. 5. And the Warrants of Attorney are good, though they be in Latin, and if they were in English they would be erroneous, and the non-entry of them is not material, for the constant practice is not to enter the Warrant of Attorney before the Issue, Trin. 8 Iac. Morley and Morley in this Court: here is not the entry of the Warrant it self, but only an entry that he is Attorny by Warrant, and so he prayed the affirmance of the judgment. Roll chief Justice, If one bring a Writ of 1000 l. and it be abated, and brings another Writ for the same debt, can you encrease the dammages accrued between the first and the second Writ? It cannot be, for the second is but the reviving of the first Writ, and not a new Writ; but here are divers points considerable, and fit to be spoken unto. A ne exeat regnum is a Writ usually sued forth although that originally it was only used in Cases of State businesses, therefore the forbearance to sue it forth is a good consideration. The Court advised to take a new Plea to try the matter. Postea.

Dammages.

Writ.

Mich.

Mich. 1653.

An Indictment was preferred against one for reading the Book of Common prayer, and it was moved to be quashed upon this exception, viz. that the Indictment did not say that he read it publiquely: but only said, that he read it voluntarily. And upon this it was quashed. An Indictment quashed.

Mich. 1653. Banc. sup.

One Captain Streeter committed by the Councel of State, and by the Parliament, for publishing seditious Pamphlets, to the Gate-house at Westminster, was brought into Court by a Habeas Corpus, and the return read and prayed to be filed by the Prisoner, which was granted, whereupon he prayed he might have a Copy of it, which was granted; then he prayed he might be bayled, but was denied, and he was turned over to the Marshal of this Court, and not remanded, because upon filing of the Return the Court was seised of the Record, and the Prisoner, and he was ordered to be brought again Friday following, to be heard what he could say against the Return. Prisoner appeared upon a Habeas Corpus.

Farmer and Lawrence.

Mich. 1653. Banc. sup.

Farmer let a Chamber and a Closet within it to Lawrence from such a time, to hold as long as she should please, paying therefore yearly as much as it should be reasonably worth, and this was by paroll; afterwards Farmer brought an Action for the rent of this Chamber and Closet, and declares upon this Lease, and avers, that she held the said Chamber and Closet from such a time to such a time, and that for that time it was reasonably worth so much, and for not paying that rent he brought his Action, and obtains a Verdict against the Defendant. It was moved in arrest of judgement, that it is alleged in the Declaration that she held the Chamber and Closet from such a time to such a time, but it doth not aver, that she held it as long as she pleased, as the agreement was. Roll chief Justice, The old Books are, if I let Land to one for as long as he pleaseth, it shall be intended as long as both parties please, and here shall be intended that the Term was determined, except you had shewed that you would have held the Chamber and Closet longer, and if the time be determined, you ought to pay presently as much as it is reasonably worth, if no time be expressed for the payment thereof; and the averment ought to be on the Defendants side, viz to allege that the Plaintiff did not suffer her to hold the Chamber and Closet so long as she pleased. Judgement was given for the Plaintiff, nisi. Arrest of judgement in Action of Debt for rent. Lease at will. Averment.

Mich. 1653. Banc. sup.

Memorandum Colonel Barkstead Lieutenant of the Tower of London, came into the Court and produced an Order of the Counsel of State, that he should not bring John Lilburn to the Bar upon a Habeas Corpus directed to him out of this Court. Noxbury of Counsel with the Prisoner prayed for an Alias habeas Corpus to be directed to him. Roll chief Justice, Why a Prisoner was not brought upon a Habeas Corpus.

stice, Take it, for no matter of Record appears before us to hinder it, and let it be returned Saturday next, which was three days after.

Norton and Jason.

Mich. 1653. Banc. sup.

Trin. 1651. rot. 935.

Arrest of judgement in an action on the Case.

IN an Action upon the Case for entring into the Plaintifs house, and making an assault upon his Daughter, and getting a Bastard Child upon her, the Jury found a special verdict, upon which the Case was this. Norton sojourned in the house of Jason, and during his sojourning there he got his Daughter with Child; Four years after Iason brought an action upon the Case against Norton for assaulting his Daughter, and getting her with Child, per quod servitium amisit. The question here was, whether because no Action was brought by the Daughter for the wrong done to her within four years, and thereby she was barred by the Statute of limitations of Actions to bring her Action, Iason the Father might now bring his Action upon the Case for the damage done to him by the loss of his Daughters service, or should be also barred by the Statute. Powis argued, that he was not barred though the Daughter was, because in many cases the Law gives two Actions for one thing, and cited 19 H. 6. 45, 46. a. and Hill. 1649. Norburies case adjudged in this Court, and said, that though the Trespas and the Assault was done to the Daughter, yet here is a per quod servitium amisit declared of, which doth belong to Iason the Father. Roll chief Iustice, This Action is an Action brought for the damage done to the Master, and though the servant will release the battery, yet the Master may have an Action for the damage caused to him by the Battery, and although the Daughter cannot have an Action, her Father may, although not for entring into his house, because it was with his leave, nor for assaulting his Daughter, and getting her with child, because this is a wrong particularly done to her, yet for the loss of her service caused by this, he may have an Action, but it is a pretty case, and fit to be argued, therefore bring no books, and we will advise upon it. At another day the case was again spoken unto by Baldwin of the Inner Temple on the Defendants part, and he made the question to be, whether this be an Action of Trespas vi et armis, or an Action upon the Case which is here brought, and he argued that it is a Trespasse vi et armis, and not an Action upon the Case which is here brought, and cited Nat. Brev. 86. & 17 Ed. 3. and 12 H. 4. and the 9 Rep. the Earl of Shrewsbury case, and said, that the matter here alleged is not Causa causans, but Causa causata, and he agreed that one may be lyable to divers Actions for one Trespas in divers respects, but here all the matter is jumbled together, and it cannot be an Action upon the Case, for the judgement ought to be quod defendens capiatur, which is the Judgement in a Trespas vi et armis, and not in a Trespas upon the Case, Hob. Rep. Wheatly and Stones Case, And although the Action conclude with a per quod servitium amisit, yet it founds more in Trespas than to be an Action upon the case and then he is barred by the Statute of limitations, for not bringing it within 4 years, and here are entire damages also given for all, which ought not to be, for the Defendant was a sojourner in the Plaintifs house, and had licence to enter into it, & by consequence is is not guilty of the vi et armis declared, of Hob. Andrews and

Case.

de

de la hope, 22 Eliz. Dyer 369. 20 Iac. Rhetorick and Chapels Case, and therefore no dammages ought to have been given for the domum fregit, because he entred with License. Roll chief Iustice, It may be the entire dammages are given by the Jury, for the trespasse, of which they make doubt and refer to the judgement of the Court, and not for the entring with License: but if the entire special matter had been found and left to the Court, it had been otherwise. But if they had not made a doubt, they might have found him culpable, and so I doubt that it is not good to find the dammages entire, because as to the Trespass for entring vi & armis he is not guilty. But for the other point the cause of action is per quod servitium amisit, and for this he hath brought it within the time limited by the Statute, for it is an Action upon the Case, although the causa causans is the vi & armis which is but inducement to the Action, and the causa causata, viz. the loss of the service is the ground of the Action. Hales è contra said, that the dammages shall be applyed to the other matter. Roll chief Iustice, this is the sole Question, whether the dammages refer to all the Trespass or not, and upon reading the Record he said, that it referred to all, and so is not good. The rule was to shew cause why a new Venire should not issue forth to try the matter de novo.

Dammages.

Venire. Tryal.

Mich. 1653. Banc. sup.

The Court was moved to quash an order of Sessions made for the committing of one Wade and another, Surveyours of the High-way, untill they should pay the arrerages of mony collected by them upon the Statute of 2 & 3. Phil. & Mar. C. 8. for amending of High-waies, and it was prayed the Prisoners might be bayled. These exceptions were taken by Twisden against the Order, first to the Mittimus, in that the parties were not convicted before the Justices as they ought to have been. 2ly. The Mittimus is repugnant in it self, for they are committed for not paying of illegal rates levied upon the Parishioners, and if they be illegal they are not to be paid. 3ly they are committed for not paying all the mony by them levied, whereas they are to deduct 8 d. in the pound out of it for their pains in collecting of it, and so they are committed for more than is due. Roll chief Iustice, The order is not good, yet let them on the other side take time to maintain it if they can, because it is an order for repairing of the High-way, which is for the good of the Common wealth.

To quash an order of Sessions.

Order of Sessions.

Henshoe.

Mich. 1653. Banc. sup.

A Writ of Error was brought to reverse a judgement in an Ejectione firmæ; it was moved for the Defendant in the Writ of Error, that the Record was not yet transcribed, and therefore prayed he might amend the judgement by making it recuperet instead of recuperare debet, because it was only the fault of the Clark in mis-entring. Roll chief Iustice, This is a matter of substance, and we cannot tell whether the judgement be final or not. If it be not final it ought to be recuperare debeat: but if it be final, it ought to be recuperet. Therefore we will make no rule in it.

Error to reverse a judgement in an Ejectione firmæ.

Amendment. Judgement.

Mich.

Mich. 1653. Banc. sup.

Vpon what promise an Action lies. Averment.

BY Roll chief Iustice, If one make a lease for years of land, reserving rent, and after the Lessee promiseth the Lessor to pay the rent, an Action lies upon this promise, if the promise was made at the time of the Lease made, but in the Action brought this promise must be expressly averred to be so.

Bocking and Symons.

Hill. 1654. Banc. sup.

Error to reverse a judgement in the Common Pleas.

A Writ of Error was brought to reverse a judgement given in the Commmon Pleas, and the Error assigned was, that the Action was brought against 3 persons, one of whom was within age, and that they all appeared by Attorney, whereas he within age ought to have appeared by his Guardian, and so the Iudgement was erroneous as to him, and consequently to the rest because it was a joynt Iudgement. Roll chief Iustice, This is a good exception, for it being a joynt judgement, if it be naught in part, as without doubt it is, it is naught in the whole, And so it was reversed.

Iudgement.

Hill. 1652. Banc. sup.

To quash an Endictment for not repairing a High way.

THe Court was moved to quash an Endictment for not repairing a High-way. The Exception taken was, that the Endictment did conclude, that the party ought to repair it by reason of his tenements, which was said to be uncertain, and it ought to have said, that he, and all those whose estate he hath in the Tenements used to repair it. And 2ly. It should have said, that by reason of the tenure of his Tenements he ought to repair, and not by reason of his tenements, And upon these Exceptions it was quashed.

Trevilian and Welman.

Hill. 1654. Banc. sup.

Arrest of Judgement for words.

TRevilian brought an Action upon the Case against Welman for speaking of these words of him, viz. He did put in two Horses to Colonel Windham, meaning Colonel Windham that was Governour of Bridgewater, and as soon as any warrants came for the pressing of men for the service, he acquainted the Cavalliers, by reason whereof none could be pressed that were fit, and he doth hold constant correspondency with the Cavalliers. Upon Issue joyned, and a Verdict found for the Plaintif, It was moved in Arrest of Judgement that the words were not Actionable, because utterly uncertain, either when Col. Windham was Colonel, and when the Horses were put in, and the other words are as incertain as these. But it was answered, that if all the words be taken together, they are certain enough to ground an Action, for if they be true the Plaintif thereby will be expressly made a Delinquent, and have his estate sequestred for adhering and assisting the King against the Parliament, and of this opinion was the Court, and thereupon the Plaintif had his judgement.

Hill.

Hill. 1654. Banc. sup.

IN the Case of one Page and Crook, it was said by the Court, That if an Action of Trespass be brought against one with a simul cum with others, if nothing be proved against the others, they may be examined as witnesses in the cause. Who may be Witnesses.

Whitehead and Buckland.

Hill. 1654.

WHitehead brought an Action of Trespass by Original against Buckland, for taking away 400 Sheep, and 26 Bullocks, the Defendant pleads the Statute of 21 Iac. of limitations of actions in Bar, the Plaintif replyed that he sued forth an Original writ within 6 years, and that the proces thereupon was duly continued, upon this the Defendant demurred, and for cause shews, that the replication is not good; for when the Plaintif says that he sued forth an original, he ought to have added prout patet per Recordum, which is omitted. 2ly. He hath not pleaded the continuances of his proces upon the Record. Maynard answered, that the replication is good, for we cannot take a traverse upon their plea, which is surplusage, and we need not plead all the continuances but it is sufficient if we plead as much of the Record as goes in Bar. Roll chief Iustice, The plea is plain, and it is not necessary to allege the continuances, for here is an appearance. At another day Maynard said, the plea in Bar is not good, for he pleads an immaterial thing, for it matters not when the original was sued forth, but he ought to plead not culpable within six years before the Original sued forth. Roll chief Iustice, This is the usual way of pleading, and it is but to put you to a new assignment, and the plea is good, for you are not tyed up by it, for you are not forced to joyn issue, for you may make a new assignment; but waive the Demurrer on one part, and the pleading of the Statute on the other part, and take a new plea and go to a tryal, otherwise we must give judgement for the Plaintif. But the Court would advise. Latch at another day said, that the replication is naught for the uncertainty, for it doth not appear where the Original was sued forth, nor the time when, for it is only said he sued forth an Original in Michaelmas Term, and part of Michaelmas Term may be within six years, and the other part may be after the six years, and so it cannot be known whether it was sued forth in due time or no, and because no place is shewed there can be no Venue. Adjourned to the next term. At another day the Case was moved again, & then the 2 exceptions taken, that it was not said prout patet per Recordum, and had not shewn the continuances of the proces, were over-ruled by the Court; and then another Exception was taken to the replication, that it concluded & hoc petit quod inquiratur per patriam, which is not good, for it hinders the other party to rejoyn, and he is compelled either to joyn issue, or to demur. Latch answered, That the party may not be admitted to take advantage of this fault now upon a general demurrer, and he is not tyed up from rejoyning, although an issue be offered him, for though the plea be informal yet he may pass over and rejoyn, Hob. f. 80. Newman and Stones case. Notwithstanding an unnecessary traverse the party may plead over, and is not bound to joyn issue, and the impertinency of the plea shall remain but only Demurrer to a replication in Trespass vi et armis.

as a blemish in form of the plea, and shall not be accompted a fault in the substance of it. And 2ly. their bar is not good, and therefore it matters not though the replication be not good, for it is impertinent to set forth an Original, but he ought to have pleaded generally that he was not guilty within 6 years before the Original brought, but here he hath impertinently set forth the time of bringing the Original, and this answers not the Statute, and the matter alleged destroys his own plea, and here can be no good Issue joyned without departure from his plea, to wit from his bar, and this is not to be suffered in pleading; and here is neither certainty nor congruity in the parts of the pleading, for the beginning of the term is uncertainly alleged. 2ly. He shews not what day of the Term he issued forth his original, but only says generally in Michaelmas Term, which in Cole and Sibseys case in this Court was lately adjudged naught. Hales on the other side said, that the bar is good, and that the replication is insufficient, because the Defendant is tyed up by an issue, and is not suffered to rejoyn, and it is insufficient in substance, for he hath not made a proper conclusion, for he ought to have concluded, et hoc paratus est verificare, and as it is it is impertinent, and the Plaintif cannot pass over to rejoyn as Latch supposeth, and this case is not like the case of the traverse cited by him, where he may pass over, it being but in matter of form, but it is not so here, for the Travers avers the plea, and concludes not the party as here he is concluded, and can do no other thing but demur or joyn in the Issue tendred; And the bar also is good and sufficient, notwithstanding the time of the Original issuing forth be alleged, although it was in his election to have shewed the time, or not to have shewed it. and his shewing it makes not the plea worse but more certain, and although it be not the truth of the Case as he hath alleged it, I doubt whether it should be a departure for the Plaintif to reply to a new Original assigned, and it may be there were two Originals, and the Defendant relyes upon the last Original, and if the other Original be pleaded he may reply to it afterwards. 2ly. Admitting he cannot depart, this will doe no hurt, for the plea is not worse for him although it be better for the other. 3ly. It is not incertain to say that it issued forth in Michaelmas Term, for all the Term is but one day in Law, and it is said when the Term began, namely the 23 of October, and if it be not so certainly expressed as it ought to be, yet by the replication this advantage is lost, and it is not like to Cole and Sibseys case cited on the other side, for there was a special Demurrer, but here the Demurrer is general, and there it was of the parties own setting forth. Latch, If the Assignment of the Original be at his peril, if he set it not forth right it is ill, and it is not well here assigned, for there is neither time nor place alleged when it issued forth. Roll chief Justice, I conceive the replication is not good, for the party is bound up that he cannot rejoyn, but must either demur or joyn in Issue with you, and I have not heard of passing over in this Case, as may be done in the Case of a Traverse which concludes not the party, and here you aver not your plea as you ought, and the other ought to be left at liberty to rejoyn if he please, which he cannot do here; but it is doubtfull whether the Plea in Bar be good or not, because there is no time certain alleged of issuing out the Original, for it is said generally in Michaelmas Term, whereas an Original bears Teste at a day certain, and may issue forth out of the Term, and it is not like a judicial writ, and it is questionable whether this be matter of form only, or of substance, and me seems it is matter of substance to be averred. The Court would advise.

Replication.

Averment.

Original. Teste.

At another day the Case was again put and spoken to by Wadham Windham, who, upon putting the Case urged, that the Defendant here sets forth ano-

another original not set forth by the Plaintiff, and this is not brought within the time limited by the Statute; and upon this the Plaintiff rejoyns, and he cited Coles and Sibsyes Case, and insisted, that the Defendants plea in bar is not good in the matter of substance, for he shews no time nor place when he first sued forth his Original, and he ought to shew when he took it forth, that the Court may judge whether it was done in due time or no, as the Statute requires, and not to put the Court to make enquiry when it issued forth, and although it be but surplusage to shew it, yet now having taken upon him to shew the time, he ought to shew it precisely, Hill 10 Iac. Westby; and Rookes Case in this Court, the mis-pleading of a Statute is not good, though the party was not bound to plead it, and so it is here. And the replication doth us no harm: for there is no matter in it that makes against us, for the Court ought to judge upon the whole Record, and consider who made the first fault, and that hath the Defendant done in his bar, and that in matter of substance, and he cited Cardinal Pools Case, and Hob. rep. Baspooles Case, and prayed judgement for the Plaintiff. Wild on the other side said, that the bar is only vitious in form, and so it hurts not, and if so, then the other party hath lost his advantage of it by the Statute, for he hath not demurred upon us, but we have demurred upon him, to wit, upon his replication. Roll chief Iustice, I am of opinion that the setting forth of the Original by the Defendant, and concluding that he is not guilty within six years from that time is not good: but now that is waived by the replication, and is made matter of form, as it is in the Case of a new assignment, and the Common bar is now out of doors. It had been good to have shewn the precise day of taking forth the Original, but it is not absolutely necessary to do it, and this is not like the mis-pleading of a Statute which must be precisely pleaded and is matter of substance: but this is matter of form only, and besides this matter is here waived, and nothing is shewed by the Plaintiff which can bar him of his Action, nor hath the Defendant pleaded any thing to bar him. And by the replication you have hindred the Defendant to plead to your, for you have concluded ad patriam, and stopped him from proceeding further in pleading: but the principal matter is, that you have waived the matter pleaded in bar, of which you might have taken advantage, and I conceive that he who demurs upon matter of form ought to shew the special matter wherefore he demurs: but if it be waived by the other by his replying, he shall not afterwards take advantage for the not shewing it, notwithstanding the Statute, and divers opinions upon it, for the Statute enjoyneth to set forth the matter of form pleaded insufficiently. Nil capiat per billam, nisi.

7 H. 7. f. 15. Dyer, 365. Lakes Case. Demurrer. Advantage.

Hill. 1653. in the Upper Bench.

MAster Attorney General moved the Court after issue joyned in an Endictment preferred against Mrs. Levingston, and the Tryal being to be the next day, that the Tryal might be staied by rule of Court, because the Endictment is erroneous in many things, and the Tryal thereupon will be fruitlesse, for no judgement can be had upon it, and we may prefer a new Endictment, and one fault in it is, that the Bill was found by a Grand Jury, whereof some of them were outlawed when they found it. Wild on the other side prayed the Tryal might go on, because the Issue is joyned, and the Jury returned, and many Witnesses, viz. a hundred at least are brought to Town, some a great way off, and are kept here at a great charge. Roll chief Iustice, The Attorney may waive the Issue if he please though it be joyned or he may demur if he will, therefore let him

To stay a Tryal upon an Endictment. Waiver. Demurrer.

Entry. Rule. make what entry he thinks good upon the Roll, for we will make no rule in it.

Stephenson and Steward.

Hill 1654. Upper Bench.

Exception to a Plea of Privilege of Parliament.

STevenson brought an Action of Debt against Steward for rent, the Defendant pleaded in abatement of the Writ that he was, in regard of monies which he had lent to the Parliament, protected by their special order from all arrests. The Plaintiff replyed, that this order was afterward repealed by another general order of Parliament. Carew urged, that the Defendants plea was not now good, because the Parliament being dissolved, their orders are of no force; and prayed judgement for the Plaintiff. Roll chief Justice, If the plea was good when it was pleaded, your Action must abate, and you must begin again: for the plea is but in abatement, and not peremptory to the party; and therefore let the Writ abate.

Abatement. Peremptory.

Hill. 1654. Upper Bench.

Where may be a new Original.

BY Roll chief Justice, If an Action of Battery by Original be against two, and one comes in upon the Exigent, there may be a new Original brought against the other with a Simul cum, and those who are waived may be Witnesses in the Cause, and this is usual practice: but those who are declared against with a Simul cum cannot be Witnesses.

Witness.

Greenling and Bawdit.

Hill. 1654. Upper Bench.

Arrest of judgement in an Action upon an Assumpsit.

GReenling brought an Action upon the Case against Bawdit, and declared, that the Defendant in consideration that the Plaintiff would marry such a Woman, did assume and promise that upon his marriage with her, he would pay the Plaintiff 50 l. and would also give unto him yearly one firkin of Eggs, and a flitch of Bacon during the life of the Plaintiff; and upon a Nihil dicit the Plaintiff obtains a Judgement, and upon a Writ of Enquiry of dammages executed, great dammages were found for the Plaintiff. It was moved in arrest of Judgement, 1. That it doth not appear for what breach of promise the Action is brought, whether for the not paying the 50 l. or not paying the Eggs and Bacon. 2ly. It is not averred in what year the Defendant was to begin to pay the Eggs and Bacon. To this Roll chief Justice answered, that it shall be intended to begin within the year next after the marriage shall take effect. 3ly. It was excepted against, that it doth not appear for how many years the Eggs and Bacon were unpaid, and the promise was made anno 1647. and the Writ of Enquiry was executed anno 1653. But Roll chief Justice over-ruled the Exceptions, and to the last answered, the Record is hue usque, and so it is certain enough. Therefore let the Plaintiff have his Judgement, nisi, &c.

Intendment.

Hil.

Hill. 1654. Upper Bench.

IN the Case of one Banister where the Action was an Action of Debt brought against an Executor, Roll chief Iustice, said, That riens inter maines pleaded by an Executor is an affirmative plea in substance, though it sound something in the negative, for it is in effect the same with plene administravit, and such plea must be averred, and he put this difference, viz. where an Issue is joyned up upon a negative plea without any replication, it is not necessary to aver the plea, but if there be a replication it must be averred.

What is an affirmative plea and not negative.

Averment.

Hayward and Ducket.

Hill. 1654. Banc. sup.

Pasch. 1653. rot. 196.

HAyward brought an Action upon the Case against Ducket that was Executor to another, and declares, that whereas the Testator did owe unto the Plaintif such a sum of money, which the Plaintif did intend to sue the Defendant for, the Defendant did assume and promise to the Plaintif, that if he would forbear to sue him for the money, and would suffer him to go into the Country, he would pay the money, and for breach of this promise he brought his Action, and obtains a verdict. It was moved in Arrest of Judgement, that there appears no consideration in the Declaration to ground the promise upon, whereby to make the Defendant lyable to pay the money which he promised to pay, for it doth not appear that he is Executor, and Rosyer and Langdales case, Anno 1650. in this Court was cited. To this it was answered by the Councel on the other side, That a good consideration doth appear well enough, for when he saith that he was to forbear to sue him as Executor, it shall be intended that he was Executor at the time when he should so forbear to sue him, and the promise is so laid. Plow. 128. Roll chief Iustice; To say that I will forbear to sue one as Executor, is not an affirmance that he is Executor, and there was such a case as this ruled in the Exchequer; and it is no more, nay not so much as if he had said, that he would not sue him at all. Iudgement pro Defendente, nisi.

Arrest of Iudgement in an action upon a promise.

Hill. 1654. Banc. sup.

BY Roll chief Iustice, In an Action upon the case vi et armis, It is not necessary to conclude contra pacem publicam, but in an Action of Trespass quare vi et armis, the conclusion must be contra pacem publicam.

Where one needs not conclude contra pacem publicam.

Hill. 1654. Upper Bench.

BY Roll chief Iustice, A special Bayly is bound to shew his warrant to the party whom he is to Arrest, otherwise the party to be arrested is not tyed to obey him, but he is not bound to shew his warrant to a Stranger, but a known Bayly is not bound to shew his Warrant to any.

What Bayly must shew his Warrant.

Borking & Symons

Ant. 400. S.C.

Hill. 1654. Upper Bench.

What Writ of Error is good.

By Roll chief Iustice, If an Action be brought against three, and one of them is an Infant, and they all appear by Attorney, and an entire Iudgement is given against them all, and they all joyn in a writ of Error to reverse this Iudgement, this writ is well brought, for the judgement was erroneous, because it is an entire iudgement, for as to the Infant it cannot be good, so it is naught to the rest, and he cited one Byres case 9 Iac. in the point.

Iudgement.

Porter and Swetnam.

Hill. 1654. Upper Bench.

Trin. 1653. rot. 723.

Error to reverse a judgement upon a non sum informatus in debt for rent.

A Writ of Error was brought to reverse a Judgement given upon a non sum informatus in the Common pleas in an Action of Covenant brought upon a Lease for years for not paying the rent reserved, and not repairing, and this was against an Executrix of the Assignee of the Lessee for years, and it was brought as to the non-payment of the rent upon the words yielding and paying, and not upon an express Covenant, and for that the words yielding and paying are but a Covenant in Law, and only an implyed Covenant, and ariseth but from a personal Covenant, and not upon a real contract, as Latch held, who argued for the Plaintif in the writ of Error, Therefore he said the Action of Covenant could not here lie against the Executrix, as a warranty in Law binds only the party, and not privies, as Spencers case is, Dyer 257. 2ly. The Plaintif in the Action doth not declare that the Defendant was made Executrix, and if she be but Executrix de son tort demesne, she is not liable to this Action. Wadham Windham on the other side held, that the words yielding and paying in the Lease are an express Covenant, and the Action here is for rent become arrear in the time of the Executrix, and this Covenant being a Covenant which makes the rent payable ratione terræ, it doth concern her, and an Executrix de son tort is bound to pay the rent. Roll chief Iustice, take time to answer both Exceptions, but I conceive at present, that the words yielding and paying are an express Covenant, for if they were not, what remedy else would there be to recover the rent? for if she be a disseisor, neither debt nor Covenant will lie against her. At another day Windham argued that the Action was well brought, because this is an express Covenant, and not a Covenant in Law. 2ly. It is not material to shew how she is made Executrix; and for the first this must be an express Covenant, because it is by Indenture, although the word Covenant be not expressed, for that word is not a word of Art, and so not essential to the constituting of a Covenant, Dyer 57. 27 E. 4. f. 6. And for the second it is well set forth, that she is made Executrix, for it is said she entred as an Executrix. 3ly. She hath admitted herself to be Executrix by pleading. Latch on the other side held, That here is only a Covenant in Law, and so is the book in Dyer cited by Windham, and the Executrix is not bound here, because it is against the Assignee of a Term, and the very words doe shew that here is no express Covenant, for the words yielding and paying are not the words of the Lessee, but only by construction of Law, but are the words of the Lessor enjoyning the Lessee to pay the rent. Roll chief Iustice, How

Covenant.

prove

prove you that this Action lies not against an Assignee? Latch The case of Overton & Sidney proves it, for it proves that Debt lies not, and by consequence Covenant lies not. And for the second matter, the Defendant is not intitled to the lease in privity, because it is not shewed that she is made Executrix, and so she shall be taken but as an Executrix of her own wrong, and so is not chargeable, because she hath no privity of estate but by her entry, nor is it any where ever mentioned that any can be Executrix de son tort of a Term. 2ly. She cannot be a Termor, but she must be a Disseisoress, for she cannot apportion her own wrong. 3ly. She cannot make a title to the Term by her entry, as it may be by a que estate, and therefore it is against reason that she shall be a Termor, and there is no authority against this, Pasch. 25 Eliz. in this Court. King and Burges in Mores Reports Dyer 254. Upon a Demurrer, adjudged that it was not to be shewed how one was Executor. Roll chief Justice, What say you to the Objection, that the Action is brought against you as an Executrix, and you appear and plead, and so admit your self to be an Executrix? And I hold that here is an express Covenant, for the words are the agreement of both parties to the Indenture, and then the Executor is chargeable by them, and it is not like to the Case of a Demise, and there is no difference here between a Covenant in Law, and an express Covenant, because it is touching a thing which ariseth from the land, and so the Assignee is bound by it, and this Case is not like the case cited out of Dyer, for there the estate was determined, but here it continues. And as to the last point, I conceive prima facie, that she shall be accompted a true Executrix, and you by pleading have admitted it; and if one enter as an Executor upon a Term, he may have the Term if the other will admit him to be a Termor, and he shall not be accompted a Disseisor to the Lessor, and to strangers he shall be accompted an Executor in Law, if they bring Actions against him, and the Term shall be assets in his hands; As if one receive my rents without my consent, I may charge him as my receiver, or make him a disseisor at my election. Curia ad idem, and so the Judgement was affirmed. But afterwards it was moved again, and the writ of Error was quashed for a variance betwixt it and the Record, for the Record is against the Assigns, and the writ of Error is to remove a Record against the Assignee. Postea. Assets.

Bromefield and Sir Iohn Williamson.

Hill. 1654. Banc. sup.

Mich. 1651. rot. 353.

BRomefield brought an Action of Debt upon an Obligation to perform the Covenants of a Lease for years against Sir John Williamson, the Defendant pleaded that he had performed the Covenants, the Plaintif replyes, and sets forth a breach, and upon this the Defendant demurred, and upon the Demurrer the Case was this: A Lease was made for one year, the Lessee covenants for him and his Assigns to pay the rent, so long as he and they shall have the possession of the thing let; the Lessee assigns over his Term, the Term expires, the Assignee continues the possession after the Term expired, and for rent behind by the Assignee after the expiration of the Term, the Lessor brings the Action, and the question was whether here be such an Assignee that the Action will lie against, or not, Roll chief Just. held, that though here be not an Assignee, strictly, according to the rules of Law, yet that he shall be accompted such an Assignee as is to per- Demurrer to a replication in debt upon an Obligation. Assignee. Covenant.

perform the Covenants made between the parties, and ruled the Defendant to shew cause why the Plaintif should not have judgement. Nota.

Wood and Markham.

Hill. 1654. Banc. sup.

For a restitution after an habere facias possessionem executed.

UPon an Ejectione firmæ brought, and a Tryal thereupon had, a Verdict was found for the Plaintif; but upon an agreement made between the Plaintif and the Defendant, the Defendant was to hold the land recovered the remainder of his Term to come, and according to this agreement he held it for 2 years, but afterwards, before his term expired, the Plaintif takes out an habere facias possessionem, and executes it. Serj. Bernard moved for the Defendant upon this matter shewed to the Court, That the Defendant might have a rule for restitution. But Roll chief Iustice answered, It cannot be, but you must have your Action upon the Case against the Plaintif for not performing his agreement, for the Act seems to be unconscionable.

Restitution.

Case.

Masters and VVallis.

Hill. 1654. Banc. sup.

Pasch. 1652. rot. 581.

Errot to reverse a judgement in Tresp. quare vi et armis.

A Writ of Error was brought in this Court to reverse a Judgement given in the Common Pleas in an Action of Tresp. quare vi et armis, and the Error assigned was, that the Tresp. is concluded to be contra pacem, &c. but doth not say publicam. Twisden answered, that it is well enough, because the Action was commenc'd by Original, but if it had been by Bill it would have been otherwise. Roll chief Iustice, It is the use in the Common Pleas to make such short recitals, but in the beginning of the Record here it is recited at large, and if it were not recited at large it would not be good; but for the matter it self it is matter of substance, and generally it ought to be concluded to be contra pacem publicam, yet it is good here as it is for the reasons before alleged. Affirmetur judicium nisi, &c.

Recital.

Hill. 1654. Banc. sup.

Against filing a return of a writ.

VVild moved against a Sheriff, that he may not be admitted to file the return of a writ directed to him, because an Action upon the Case is depending against him for not returning this writ, and if he should now be admitted to file the return, he would thereby abate our Action. Roll chief Iustice, If the writ be not filed, it shall not be filed till the Court be moved; but he cannot file it as of this Term, though he should file it for the return of the writ, (as it seems) is long since past, but if the return be already filed you move too late.

Swan

Swan and Fenham.

Hill. 1954. Banc. sup.

Trin. 1650. rot. 1072.

IN an Action of Trepass and Ejectment a special Verdict was found, and in it this Custom, viz. That the Owners of Houses in the Town of New-Castle in fee simple may devise them by Parol, but not Tenants in tayl, and it was further found, that the Testator was seised of the Houses in question in fee tayl in possession, and of the remainder of them in fee-simple, and so seised did devise them by Parol. The question was, whether this devise was warranted by the Custom. Shafto argued, that the Custom did not warrant this devise, because Customs are not to be enlarged by construction, but are to be taken strictly, and according to the letter, because they run in abrogement of the Common-law, and so are not to be favoured, 9 E. 3. f. 38. 11 H. 4. f. 33. 5 H. 6. f. 51. Next here are immaterial words found in the Verdict, for if it be the Custom for Tenant in fee-simple to devise, yet this extends not to tenant in tayl, 27 H. 6. f. 5. 21 E. 4. f. 34. and a devise of rent to be issuing out of these Houses is not good within the Custom, although that a rent doth follow the nature of the Land, 22 Assis. pl. 78. 26 H. 8. 54. It is true, Cook in his Littleton, f. 111. saith, that one may devise a rent in remainder, but I deny this, for the authorities of the Books are against him. An estate in remainder is not Assets, nor can be devised, 3 H. 7. f. 23, 24. a condition goes to an Estate-tayl, not to a fee-simple in remainder, 6 Rep. f. 33. And here is but a power of an Estate, and not an Estate in possession, Lit. sect. 137. And the finding here that the Tenant in tayl did die without issue is not material, for this could not be known at the time of the devise, and the devise takes its effect in the time of the Devisor, 27 H. 8. Dyer 45. 5 Eliz. Dyer, Bishops Case, 1 Rep. Archers Case, f. 66. 2ly. Here is no Custom found to intitle the party: for a Town cannot have a Custom as it is here found, though a Borough may, 22 Ass. 178 and this is not found to be an antient Will, 7 H. 6. Dyer, 22 H. 6. Fitzh. præscript. 47. Next the Custom is not found, that Burgers may devise as it ought to be. Turner Iohn on the other side held, that some Estate doth pass by the Will, and it matters not what Estate passeth, and the Owners of Houses in our Case shall be intended to be Tenants in fee-simple, and it is not necessary that they be Tenants in fee in possession, Perkins devises, Plowd. 262. Dyer 22. 23 Eliz. 371. p. 5. and the Custom here found is no more, but an ordinary Custom common to other Boroughs, and it shall not be intended a special Custom. And this case may be resembled to Cases upon the Statute of 32, & 33 H. 8. for devising of Lands, 10 Rep. f. 81. Trin. 34 Eliz. Benefilds Case there cited, and 35 Eliz. Howards Case, which prove, that reversions may be devised. Nat. brev. 199. a. Perkins Devises, Pl. 240. is the very Case in question, and the Cases put on the other side come not to our Case. Roll chief Iustice. It is not necessary in a special Verdict to be so precise as in pleading, but something may be supplyed, and the verdict hath found that he was Owner, and that the Owner may devise, and the Custom is, that every Owner in fee-simple may devise, and the Custom shall go to Land, and holds to reversions as well as to lands in possession. At another day it was argued, that the devise was not good, for the word Owners cannot extend to all sorts of Owners, for it extends not to an Infant Owner of such Houses, for he cannot devise,

Special verdict in Tresspass and Ejectment.

Special verdict.

therefore the words must receive a limited construction, and therefore I conceive the word Owner extends only to an absolute Tenant in fee-simple, and not to a reversioner in fee: for a Custom must, as hath been said, be taken strictly, 12 E. 4. f. 3. 21 E. 4. f. 24. 2ly. In true construction this Owner in fee in remainder shall not be said Owner, but the Tenant in tayl is Owner, and so here is not Owner ex vi termini. 3ly. Here is but a possibility of fee-simple in him, which is not grantable or devisable, 2 Ed. 4. 1. and the Statute of Westm. 2d. helps not to the Custom: for that Statute is within memory of man, 26 H. 8. f. 4. 22 Ass. Pl. 28. And upon the very finding of the verdict it cannot be good, for by the Verdict no title is found for the Defendant. Latch on the other side held, that here is a good devise warranted by the Custom, for here is an Estate within the very letter of the Custom, for he is true Owner of the House in fee-simple, although it be not in present possession, for he hath fee-simple in it, and hath it to his own benefit in such an Estate as it is, and the word Owner is a general word, and comprehendeth all manner of Ownerships. 2ly. It is within the reason of the Custom, for it intends the same benefit to Owners in reversion as it doth to Owners in possession, and is indifferent unto all Estates. And although a Custom shall be taken strictly, yet it shall also be taken reasonably, as having respect to the benefit of the party, and there can be no reason alleged to be against this devise; 26 H. 8. 4. A remainder in fee shall go according to the Custom, whether by the Custom Lands in fee shall go, the Custom shall go to all things issuing out of the Land, and so to all Estates in the Land, Dyer 148. and here is more than a possibility devised, 4 & 5 Phil. & Mar. Benloes. It is ruled, that a fee-simple expectant shall go to the youngest Son by the Custom, where the Custom was, that the youngest Son should have the Lands of which his Ancestor died seised; and as to the Verdict here is a good title found for the Defendant. Roll chief Justice, The verdict is imperfect, for the Ejectment is against Baron and Feme, and the Feme is found Ejector by the verdict, and nothing is found concerning the Baron, therefore you must have a Venire de novo, if you will not agree to amend the Verdict according to the notes, if the notes will warrant it. Afterwards a Venire de novo was awarded by consent.

Venire de novo.

Pendarvis and Saint Aubin.

Hill. 1654. Banc. sup.

Trin. 1653. rot. 723.

In an Action of Accompt the Defendant pleads ne unques receptor, upon this an Issue was joyned, and an imperfect verdict found, and thereupon a Venire de novo was awarded, and the Jury found for the Plaintiff, and the Defendant adjudged to accompt before Auditors. The Defendant pleads before the Auditors, that he had delivered over part of the monies. To this the Plaintiff demurs, and shews for cause that this Plea is contrary to the Verdict, for that is, that he should accompt for all, and here he would accompt but for part only. Windham for the Plaintiff argued, that this cannot be a good plea before Auditors in discharge of the accompt, but it goes in bar of the accompt, Dyer 196. 41 E. 3. f. 31. 22 H. 6. 25. and in Boynton and Cheeks Case lately in this Court such a Plea was adjudged not good. And it would be mischievous if it should be otherwise, in reserving such

Plea before Auditors.

such matter to be tryed again. Twisden on the other side said it is a good plea before Auditors, to say, that he received the monies to deliver over, and there are four opinions in the Books how this matter should be pleaded, 10 E. 3. Br. Acc. 80. held, that this Plea is pleadable before Auditors, and this plea is in discharge of the Accompt, and therefore pleadable before Auditors, 12 H. 4. 18. And in Baynton and Cheeks Case cited, the judgement was not given upon this point. Roll chief Iustice, The Books generally are, that this plea is in bar of the Accompt: but here your plea of delivery over, hath made it a plea in bar, and it would be mischievous to plead it now, for this would cause one and the same issue to be twice tryed, and then there may be contrary Verdicts, which would be inconvenient. Therefore let judgement be for the Plaintiff. plea. Bar.

Stavely and Ulithorp.

Hill. 1654 Banc. sup.

AN Action of Debt was brought upon the Statute of 2 Ed. 6. for not setting forth of Tithes; and a Verdict was given for the Plaintiff. It was moved in arrest of judgement that the Statute was mis-recited, because it was not said the Parliament in which it was made was held by prorogation, as in truth it was. But Latch answered, that it is not mis-recited, for it is true that the Parliament was held, upon the 9th. of November, as we have alleged; though we have not expressed it to be held by prorogation, and we conceive it is not necessary to express it to be so held, for the Presidents are contrary, as in Cooks Entry, tit. Prohibition. Roll chief Iustice, The Parliament is not said to be begun and held, but only to be held, and therefore it is well enough. Iudgement was given for the Plaintiff, nisi. Postea. Arrest of Iudgement in an Action for not setting forth of Tithes. Recital.

Dorman and Snag.

Hill. 1654. Banc. sup.

AN Action upon the Case was brought upon two promises, viz. to pay so much mony upon a certain day: and 2ly. to save the Plaintiff harmless, &c. Upon issue joyned and a verdict found for the Plaintiff, it was moved in arrest of judgement, that the Plaintiff did not shew how the Defendant hath not saved the Plaintiff harmless, but only sayes generally that he did not save him harmless, and so he may bring another Action for the same thing. The Court was then of opinion that it was not good to say generally, that the Defendant did not save him harmless, but he ought to shew in what particular; as if I assume and promise to one to give him all the mony in my Purse, I must shew how much mony was in it, and after that I gave it him. At another day Sergeant Clark moved for judgement, whom Latch seconded, and said, here is a good breach assigned: for it is that he paid not the mony for which the Plaintiff was bound with him at such a day, according to his promise. Twisden on the other side said, that the consideration is to pay the usury for the mony for which the Plaintiff was bound with the Defendant, which is not a good consideration, for it is against the Common-law to let mony for usury, and so it was adjudged 2 Car. and the Statutes do but tollerate the taking of usury for monies. 2ly. Here is no time of the consideration set forth. Latch, The usury here is no more than the Statute allows, and so it is a good consideration. Alleyn, The promise decla- Arrest of Iudgement in an Act on upon two promises.

red upon is double, 1. to pay mony. 2ly. To save harmless, and the breach is assigned generally, and not particularly as it ought to be. Roll chief Iustice, If two breaches be assigned, and the one well assigned, and the other not, yet the Action lies well enough: but here is but one breach assigned, viz. the non-payment of the mony at the day. And for the other matter I hold it a good consideration to assume to save one harmless from paying of Usury, and the usury here expressed is lawfull by the Statute, and so it hath been resolved since 2 Car. and therefore let judgement be for the Plaintiff, nisi.

Case.

Consideration

Turner and Trapes.

Hill. 1654. Banc. sup.

Motion to alter a Plea in the Petribagg-Office.

TUrner brought an Action of Debt upon a recognisance in the Pettibagg. The Defendant prayed oyer of the Condition there, and had it, afterwards he shews this matter to this Court, and prays, in regard he had mistaken his plea, that he may replead. Roll chief Iustice, This cannot be granted upon motion here, for if the issue be joyned in the Pettibagg, you must try it, we can make no rule but by consent.

Hill. 1654. Banc. sup.

To plead specially.

WAdham Windham moved for his Client, that he might have liberty to plead specially in an Action of Trespass and Ejectment, and not generally not guilty. Roll chief Iustice, For what cause? VVindham, Because there hath been matter given in evidence at a former Tryal, which ought not to have been. Roll chief Iustice, proceed according to the course of the Court, if the other will not consent you shall not plead specially, yet let him shew cause why you may not plead specially.

Barker and Elmer.

Hill. 1654. Banc. sup.

Whether a Mis-tryal or no.

THe Case was this, one of the Iustices of Assize falling sick, and dying at Chelmesford in Essex, the Assises were adjourned to Brentwood in the same County; afterwards, and before the sitting at Brentwood the other Iudge fell sick, and died at London, and a new Commission issued forth to authorise another Iudge to sit at Brentford according to the adjournment, and there a Tryal was had upon the old Iurata returned before the other Iudges. The question was, whether this were not a mistryal, in regard there was not a new Jury returned; The Case was divers times moved, and the Court took time to advise: but at length Roll chief Iustice delivered the opinion of the Court, that this was not a mis-tryal, because the death of the Iustices was not material to make it void, for the Iustices are not named in the Iurata: but the Cause is expressed generally to be tryed by the Iustices. And he said, that he held it for a rule, that if a Clark mis-enter a thing usual in matter of form, it is to be amended: but the error of the Iudge may not be amended, and he cited these Presidents, Mich. 13 Car. Sawyer and Hortons Case in this Court, and Hill. 15 Car. Belch and Fates case in this Court.

Mis-tryal.

Mis-entry. Amendment.

Hill.

Hill. 1654. Banc. sup.

AN Action of Assault and Battery was brought against two, one of them pleads his privilege of Parliament, and the other non cul. The Plaintif moved the Court that he might strike him out of the Declaration who had pleaded the privilege, and might proceed against the other only: But the Court would make no rule, but bid the Plaintif proceed as he pleased at his own peril, Motion to strike one Defendant out of the Declaration.

Hill. 1654. Banc. sup.

ONe Cock was committed by the Court for delivering a Bill of Middlesex to arrest one as he was coming to the Court about his occasions, but was presently released, paying the fees and discharging the party arrested, and the Bailif was reproved, but not committed, because he said he knew not that the party had any business in Court, and that he arrested him out of the Hall. Nota. Commitment for contempt to the Court.

Hacker and Newborn.

Hill. 1653. Banc. sup.

IT was shewed to the Court that the Plaintif had heretofore had a tryal at the Bar for the same thing, for which he now brings his action, and that it went then against him, but he hath not yet payed the Defendant his costs, and now brings a new Action; It was therefore prayed that he may pay the Costs taxed in the former Action before he be suffered to proceed in this Action. Roll chief Justice, Let it be so ruled. To stay proceedings till costs paid in a former Action.

Higgs and Harrison;

in

Hill. 1654. Banc. sup.

Mich. 1653. rot. 429.

HIggs brings an Action of Trespass quare clausum fregit against Harrison an Attorney of the Common Pleas. The Defendant pleads his privilege by an Attorney, and to this plea the Plaintif demurred; the question was whether he may plead this plea by Attorney, or ought to plead it in proper person. Latch argued, That he ought not to plead it by Attorney, for this plea is not a plea to the jurisdiction of the Court, but it is only a prayer to the Court, and he might have done it ore tenus, and pleading it by Attorney his plea cannot be entred, for then the plea of privilege would be destroyed in making him to attend. Every one by the Common Law ought to apppear in person, and there is no Statute, Law nor usage that authorizeth an Attorney to make an Attorney to demand his privilege. 2ly. It is against the dignity of this Court that he should be admitted to do it. 3ly. By making of an Attorney he destroys the very reason why he claims his privilege, which is to be spared of his attendance, which he needs not if he make an Attorney, and his making of an Attorney here is a general warrant to defend other causes as well as this, and the Case of an Demurrer to a plea of privilege by an Attorney.

Essoign objected makes for me, which is but to pray an excuse, and after an Attorney made one cannot cast an essoign, except it be where the Attorney cannot answer, 4 Ed. 3. 34. And there is no authority can be shewed that he may make an Attorney. But on the contrary part there are many presidents where Attorneys have prayed their privilege in person, and these me seems should make the Law in this Case, Dyer 33 H. 8. is the express case, 20 H. 6. 32. The Court adviled. At another day Roll chief Justice said, That the opinion of the Court was, that an Attorney may plead his privilege by an Attorney, and there is no inconvenience follows by doing it; but it is true the Presidents are both ways, and it is not contrary to any thing he hath done, and it may be he is sick, or hath business in another Court, where he is necessarily to attend. Therefore let his plea be allowed, nisi.

Attorney.

Leake and Reynolds.

Hill. 1654. Banc. sup.

Special verdict in debt upon a bond.

LEake brought an Action of Debt upon an Obligation against Reynolds, The Defendant pleads non est factum, the Jury upon issue joyned find a special verdict to this effect, That the Plaintifs Declaration is upon an Obligation dated the 24 day of the month, and they find that the Obligation was sealed and delivered the 27 day of the month, but bears date the 24 day, and whether this shall be accompted the same Obligation upon which the Plaintif declares or not, is left to the Court to determine. Green for the Plaintif said, that this case is the same with Goddards case, and there it was adjudged a good deed, 12 H. 6 f. 1. Dyer 247. and in the end of Goddards case the case in point is adjudged. Roll chief Justice, This is a plea in Bar, and not in abatement, therefore take your judgement.

Plea.

Hill. 1654. Upper Bench.

What is not slandering a title.

BY Roll chief Justice, If one hath colour of title to land, an Action of the Case will not lie against him for saying, I have better title to the land than you, though his title be not so good as the others title is. Nota.

VVingfield and Valence.

Hill. 1654. Banc. sup.

Hill. 1650. rot. 1409.

For restitution of monies in the Sheriffs hands.

LAtch moved to have restitution of monies out of the hands of a Sheriff, which he had levied upon an execution taken out of this Court, because it issued forth erroniously, for before the Execution taken forth the Defendant brought his writ of Error in the Chequer Chamber to reverse the judgement, and the Record was removed thither, and although the late Statute say, that a writ of Error shall be no supersedeas to stay execution, yet the Record being removed into the Exchequer Chamber, no execution can be granted out here, for here is no Record to warrant it. Roll chief Just. The case being moved again at another day, till when the Court would advise, said, The Record is removed by a writ of Error in the Exchequer Cham-

Chamber, and is not now before us, nor was at the time when the Execution issued forth, and this being after a verdict and a judgement the writ of Error is no supersedeas, and so it is mischievous both ways, but how can we help it? yet take a supersedeas quia erronice to supersede the execution, for it was ill awarded, and take the moneys out of the Sheriffs hands. Nota. Mischief. Supersedeas

The Protector and Captain Streeter.

Hill. 1654. Banc. sup.

CAptain Streeter was brought in Court by habeas Corpus, and upon the return read and filed, it appears that he was committed by an Order of Parliament, for publishing scandalous and seditious books. Twisden moved that the prisoner might be bailed, because that the Parliament is now dissolved, and by consequence the Order by which he was committed, is of no force. Mr. Attorney General on the other side urged, that the Parliament was not dissolved, but only the meeting of those persons in Parliament was dissolved, for the Parliament by the antient Law is to be every year, so that this is but in effect an adjournment, and not a dissolution, and besides, this matter for which the prisoner stands committed cannot be here inquired of, and so the cause of his commitment shall be intended to be good, and the Parliament may commit without shewing the cause of the commitment, and this commitment may be in order to his Tryal, and the Prisoner is not without remedy, for he may apply himself to the supreme Authority, to whom the Parliament have resigned their power. Twisden for the prisoner confessed, that this Court cannot be Judge of the Parliament; but this Order by which he is committed differs from an Act of Parliament, for this is tempozary, and determineth; and although the authority of Parliament ceaseth not, yet a particular Parliament may be dissolved, as this was. Wadham Windham, When a Parl. is dissolved, the proceedings there are determined. Flowrdews case 1 H. 7. the Latine case, and the Parl. is now dissolved, and not adjourned; and a Parliament dissolved is not like the Courts of Justice here in the Vacation time. Wild, This case is not like to the case where this Court remaunded a prisoner committed by the Parliament sitting the Parliament, for the prisoner here is coram Protectore who may deliver him. Captain Streeter, Mr. Attorney labours to asperse me, but shews no cause or crime for my commitment, and I am here before the Protector in his own Court. Attorney General, Only the persons and their convention is dissolved, but not the Court, no more than this Court is, by the demise of the King, or in the Vacation time, and I must refer it to the Court how far you will intermeddle in this case, and this Order by which he stands committed may be his judgement there, and then he cannot be delivered; and I know no difference between an Order and an Ordinance of Parliament, and the stamp and authority of Parliament is upon this order; and if the prisoners Counsel say true, then he may have an Action of false imprisonment against his Gaoler. Twisden. Here is no Order of the Parliament returned, but it expresseth that he was committed by the Speaker by vertue of an Order of the Parliament. Rollchief Justice, We examine not the Orders of Parliament; but the question is whether the Order doth now continue, and I conceive it is determined by the dissolution of the Parliament, and so would it have done by prorogation of the parliament, because there is another Session, and we can judge no otherwise of Orders of Parliament, but by the words of them. Ask Justice, If one that is committed by Order

For delivery of a Prisoner appearing upon a Habeas Corpus.

Order of Parliament. Dissolution.

der of Parliament cannot be delivered until another Parliament, the peoples liberty will be lost, for there may not be a Parliament in many years. Roll chief Iustice, A new Parliament hath not reference to the old, but it is a new Court created upon new Summons, and why may not the Prisoner be bailed without these disputes? although he may apply himself elsewhere; But the Court would advise, because they perceived the prisoner stubborn. At another day, Mr. Attorney, upon the prisoners appearance again upon his Habeas Corpus said, that he had no more to say than what he had formerly offered, only he added that it was a tender and a leading case, and therefore to be well advised of. Roll chief Iustice, For the first part of the return, I conceive it too general, for it doth not appear in what the books are scandalous, for the publishing whereof he was committed. 2ly. I conceive that the Order of Parliament ceaseth with the Parliament, which is dissolved; as an Order of one Session of Parliament ends with the Session, and is not like an Act, which continues after the Parliament; and all Committees made by order of Parliament do cease by dissolving of the Parliament, but those which are made by Act of Parliament doe continue afterwards; and this individual Parliament being dissolved, they can now make no further order, and so the prisoner may lie perpetually in prison, and he hath already lain long in prison, and therefore it is reason he should be bailed. The prisoner was admonished to be quiet, and not henceforth to disturb the State. The prisoner was ordered to bring sureties to be bound in 500 l. for his appearance here the next Term, and sic de die in diem until Mr. Attorney will proceed against him, if he will proceed at all.

Return.

Order.

Committee.

Bail.

Hudson and Dickenson.

Hill. 1654. Banc. sup.

For entry of a Nil capiat per Billam for expedition.

The Court was moved on the behalf of the Plaintif, that a Nil capiat per billam may be entred against him for expedition in an Action of Trespass for taking away his Cattel, wherein he had obtained a Verdict, because he had declared for taking away 6 Mares and Colts, and did not shew how many Mares, and how many Colts particularly. Roll chief Iustice, Let a Nil capiat per Billam be entred.

Pinchard and Fowke.

Hill. 1654. anc. sup.

Arrest of Iudgement in an Action upon an Assumpsit.

Pinchard brought an Action upon the Case against Fowke, upon an Assumpsit, and declares, that the Defendant, in consideration that the Plaintif would forbear to protest a Bill of Exchange drawn upon the Defendant, that he would pay the moneys when he should next come to London: And upon an Issue joyned, and a Verdict found for the Plaintif, it was moved in Arrest of Judgement, that here is no consideration set forth to ground the promise upon; for he doth not shew that he came to London, but shews that he dyed at Plymouth, and came not to London. Roll chief Iustice, The coming to London is alleged to no purpose, for the payment of the money was a duty, and the monies to be paid were received beyond Sea, and so is a duty, and made a good consideration, therefore let the Plaintif take his Iudgement.

Consideration. Duty.

Pasch.

Pasc. 1654. Banc sup.

IT was said by the Court that when an Informer hath attached his Action in a Court, another Informer cannot inform for the same thing, and if he do, it is a good plea in Bar to the second Informer, that an information is depending against him for the same thing. Nota. A good plea against an Informer.

Trin. 1654. Banc. sup.

BY Roll chief Iustice, A Bailif of a liberty hath return of writs, and therefore a rescous made from him must be expressed to be out of his hands, but a rescous made from the Sheriffs Bailif must be expressed to be out of the hands of the Sheriffs Bailif, for the Bailif is but the Sheriffs servant. How a rescous is to be expressed. Bailif.

Patnell and Brooke.

Trin. 1654. Banc. sup.

THe Court was moved upon an Affidavit to stay Execution upon a judgement given for an Administrator, because the Letters of administration were repealed before the judgement entred. Roll chief Iustice, The matter comes not legally in question before us, you must bring your audita querela, yet let Hern the Secondary examine it. To stay execution upon a judgement. Audita querela.

Trin. 1654. Banc. sup.

THe Court was moved for a writ of Distringas against the Inhabitants of a Town in Huntingtonshire, for throwing in of banks of the Earl of Bedfords in his drained lands. Roll chief Iustice, Take it, but at the return of the writ the Inhabitants may plead to you, notwithstanding Noy the late Kings Attorney would not have suffered it. Nota. For a Distringas against Inhabitants of a Town. Plea.

and the Sherifs of London.

Trin. 1654. Banc. sup.

AN Action upon the Case was brought against the Sherifs of London for not returning a fieri facias: The Defendants plead not guilty, and a Jury was returned to try the issue, and after the Defendants filed the return of the Scire facias. Wadham Windham moved, that the Defendants might waive their general plea of not guilty, and might plead specially, viz. That they had executed the writ. Roll chief Iustice, You have pleaded already, and it is in our power whether we will suffer you to alter your plea or not, and we will not doe it without the Plaintif will consent, therefore make the best of that plea you have pleaded upon your tryal. Moved that the Defendants might plead specially. Amendment.

Oyles and Marſhall.

Trin. 1654. Banc. ſup.

Againſt granting a Prohibition to the Court of Policy of aſſurance.

Juriſdiction. Tryal.

VVild upon a rule to ſhew cauſe why a Prohibition ſhould not be granted to the Court of Policy of aſſurance in London, ſhews for cauſe, that the Defendant had pleaded there, and the Plaintiff had replyed, and that the cauſe was ready for Tryal, and that the principal matter was fit to be tryed there, and they had authority to try it. Roll chief Iuſtice, If they have Juriſdiction of the principal matter, they have alſo Juriſdiction of all matters incident thereunto, and they may try them according to the courſe of their Law, ſo that it be not contrary to the Common-law. Therefore diſcharge the former rule.

Trin. 1654. Banc. ſup.

Who of common right are to repair a Sea-wall.

By Roll chief Iuſtice, If no particular perſon by Cuſtom be bound to repair a Sea-wall wherein a breach is made, the whole Level are bound to do it.

Trin. 1654. Banc. ſup.

How a Will may be revoked.

VPon evidence given in a Tryal at the Bar between Sir Iohn Bridges, and my Lord Chandois, it was ſaid by Roll chief Iuſtice, that one may revoke a Will in writing by Parol, and may revive it again by Parol.

Trin. 1654. Banc. ſup.

For a Habeas Corpus.

The Court was moved for a Habeas Corpus for one out-lawed in felony, becauſe he cannot be tryed there where the felony was done, untill the Outlawry be reverſed. But it was prayed for the Protector that a Habeas Corpus may not be granted, becauſe the Priſoner ſtands committed for divers felonies and rapes. Roll chief Iuſtice, He ſhall be brought hither by a Habeas Corpus to reverſe the Outlawry, but we will remand him to be tryed where he is.

Trin. 1654. Banc. ſup.

That one might be bayled. Quo warranto.

The Court was moved for one brought out of Wales by a Habeas Corpus, that he may be bayled, becauſe they have no Gaol-delivery there. Roll chief Iuſtice, It were good a Quo warranto were brought againſt them for not uſing their privileges duly. Let the Priſoner be bound to anſwer his offence at the next Aſſiſes.

The Protector and Baxter.

Trin. 1654. Banc. ſup.

Error to reverſe an Outlawry in felony, and prayed to be allowed.

One Baxter endicted upon ſuſpition of Robbery was out-lawed upon the Endictment, and taken upon the Outlawry, and committed to Finſ-

Finsbury Gaol; afterwards he brings a Writ of Error to reverse the Outlawry, and obtains a Habeas Corpus to be brought hither to prosecute his Writ of Error, and upon the return thereof was brought to the Bar, and prayes to have his Writ of Error allowed, and to have Counsel assigned him, and that he may have a Copy of the Record, and that he may be bayled; and he took two exceptions to the Outlawry, 1. That he was in Prison at the time he was out-lawed, and knew nothing of the Outlawry. 2ly. That the charge against him is too general, and there is no body prosecutes against him, and prayed he may go with his Keeper to his Counsell. Roll chief Iustice, You cannot be bailed, nor have a Copy of the Record, but you shall have Counsell assigned you, but you must be remanded. Bail. Copy.

Iles and VVindsor.

Trin. 1654. Banc. sup.

Trin. 1653. rot. 360.

A Writ of Error was brought to reverse a Judgement given by default in the Common-Pleas in an Action of Trover and Conversion, and the error assigned was, that the Plaintiff had declared for two pieces of Cloath, and did not express whether they were linnen or woollen cloath: But the exception was over-ruled, and the judgement affirmed, nisi. Error to reverse a judgement in Trover given by default.

Bunniworth and Gibbs.

Trin. 1654. Banc. sup.

Mich. 1653. rot. 50.

A Writ of Error was brought to reverse a Judgement given in the Court at Peterborough in an Action upon the Case upon a promise, wherein the Plaintiff declared, that in consideration that the Defendant had received 5 l. which was due by the Plaintiff unto the Defendant upon an accompt made up betwixt them at such a time, the Defendant did assume and promise to the Plaintiff to pay unto him a certain sum of mony when the Defendant shall set up an Apothecaries shop in Peterborough, if the Plaintiff be then living there. The error assigned was, that here is no consideration laid in the Declaration to ground the promise upon: for the consideration is the receipt of five pounds, which was his own mony, for it was due to him upon the accompt, and this can be no good consideration. But Roll chief Iustice answered to this, that a little consideration will serve to ground a promise upon, and it may be the Plaintiff would not have acknowledged so much as 5 l. to have been due upon the Accompt, if the Defendant would not have made this promise. A second exception was taken that the Plaintiff doth not aver, that when the Defendant set up the Apothecaries shop in Peterborough that he was living there. Roll chief Iustice, This is a good exception, for the intent of the Plaintiff appears to be, that he would not have another of his own Trade in the Town to lessen his trading. Therefore let the Iudgement be reversed, nisi. Error to reverse a judgement in an action upon an Assumpsit. Consideration. Averment.

Lord and Michell.

Trin. 1654. Banc. sup.

Trin. 1653. rot. 358.

Error to reverse a judgement by a Nihil dicit in an action upon an Assumpsit.

A Writ of Error was brought to reverse a judgement given upon a Nihil dicit in the Common-pleas in an Action upon the Case upon an Assumpsit; the consideration was laid, that if the Plaintiff would forbear to sue the Defendant, that then the Defendant would pay such a sum of mony. Two errors were assigned to reverse the judgement, 1. That whereas the consideration is laid generally, that if the Plaintiff should forbear to sue the Defendant, he would pay the mony; the Plaintiff hath not averred this consideration, but saith in facto that he did forbear to sue till June, which cannot be the same consideration. 2ly. The Writ of Enquiry is said to be enquired of by twelve lawfull men in the County, whereas it should be of the County, for the Jurors for ought appears may be of another County, and then it cannot be well. Roll chief Justice, This is but an Inquest of Office, but you have not averred the consideration as you ought to have done, and this is error. Therefore let the Judgement be reversed, nisi, &c.

Averment.

Phillips and Phillips.

Trin. 1654. Banc. sup.

Error to reverse a judgement in an action for words.

A Writ of Error was brought to reverse a judgement given in the Court at Newport in an Action upon the Case for these words, Thou art a whoreson Bankrupt-Rogue, and they were laid to be spoken of a Farmer. The errors assigned were. 1. That it doth not appear by the Declaration that the Plaintiff gets his living by buying and selling. And 2ly. It appears not that the words were spoken of him in relation to his profession. And upon these Exceptions the judgement was reversed.

Bancks and Pra[illegible].

Trin. 1654. Banc. sup.

Hill. 1653. rot. 603.

Error to reverse a judgement in an action upon a Promise.

A Writ of Error was brought to reverse a judgement given in the Common-pleas for an Attorny in an Action upon the Case, grounded upon a promise that the Defendant would pay him such fees as should grow due to him as an Attorny in prosecuting such a Suit for him in the Common-pleas, and for prosecuting another Suit for him in Chancery as his Solicitor. The Errors assigned were, 1. That he doth not shew particularly how he hath laid out the mony, but only expresseth it generally, that he had expended, and there was due unto him such a sum of mony. 2ly. The Promise is, that the Defendant would pay him the fees so long as he should continue to be his Attorny and to prosecute for him, and it doth not appear that he continued to be his Attorny, and to prosecute for him during the Suit, and to make the first exception good Took and Sir Tho. Walsinghams Case late-

ly

ly adjudged was urged. But as to that exception Roll chief Iustice answered, it is not necessary to shew particularly how the mony became due, and was expended, for this would make the Declaration too long; and though the Plaintiff, as hath been objected, should bring another Action for the same thing, yet you may plead this recovery in bar generally against him. And as to the second exception it shall be intended he continued to be his Attorny, if it appears as it doth, that he prosecuted for him. Therefore shew cause Friday next why the judgement should not be affirmed. Postea.

Plea in bar. Intendment.

Kemp and Gord.

Trin. 1654. Banc. sup.

Hill. 1653. rot. 840.

AN Action upon the Case was brought by the Maior and Commonalty of the Town of Lyscard in Cornwall against Gord for not grinding at their common Mill. The Defendant demurs to the Declaration. And Wadham Windham for the Defendant urged, that the Custom is not well alleged upon which the Action was grounded. For first it is not shewed that the House where the Defendant inhabiteth, and by reason whereof it is supposed he ought to grind at the Mill is held of the Maior and Commonalty. 2ly. It is not shewed, that the Maior and Commonalty are bound to repair the Mill, and do constantly keep Grinders and Loaders. And for the first, this Custome ought to be affixed, by reason of the tenure of the House, or in respect of the Corn growing upon the ground used with the House, and it is not proper to say, a man is bound to grind by reason of his House, 8 Rep. Farmers case, f. 125. Hob. Harding and Greens case, 19 Ed. 2. Fitzh. Ass. 559. For the second, this grinding at the Mill is a personal service, and if the Maior and Commonalty be not bound to repair the Mill, and to find Grinders and Loaders, then there is not quid pro quo, and the Custom will be unreasonable, and a meer oppression, 22 Ass. Pl. 58. Latch on the other side said, here is a good Custom alleged, and it is not necessary to shew any tenure in this Action, being but an Action upon the Case, and not a Secta ad molendinum, and so is it agreed in Harding and Greens Case. And in 9 Iac. Hill. rot. 691. an Action was brought for this very Cause, and the Custom was then allowed to be good. Roll chief Iustice, I believe this is a good Custom, and the Corporation is bound to repair the Mill, and there can be no prejudice for the party to grind here, and the Custom hath been already tryed and found good. Therefore let the Plaintiff have his Iudgement, nisi, &c.

Demurrer to a Declaration in an action upon the Case for not grinding at a Mill.

Custom.

Iones and Graves.

Trin. 1654. Banc. sup.

IN the Case of one Iones and Graves, It was said by Roll chief Iustice, That if a Writ of Covenant be brought against three, and one of them die, the Writ is abated only to him; but is not abated to the rest, but only abateable: but Latch forment that it is abated to all. Q.

Where a Writ is abated, where it is abateable.

Tompkins and Clark.

Trin. 1654. Banc. sup.

Errot to reverse a judgement in an action for words.

A Writ of Error was brought to reverse a judgement given in the Court at Newcastle upon Tyne, in an Action upon the Case for these words, He, meaning the Plaintif, is a base beggarly Rascal, and hath cozened the Parliament a hundred times, and deserves to ride on the wooden horse, standing on the Sand hill. The Exceptions were, that the words are not actionable, for the Plaintif is at no loss or damage by speaking of them, nor is thereby endangered of his life, or to be punished corporally. 2ly. The words are not said to be spoken of the Plaintif, nor to the Plaintif. 3ly. The Venire is not well issued. Roll chief Justice, Reversetur, nisi, &c.

Stavley and Ulithorp.

Trin. 1654. Banc. sup.

For judgement in an action on the Statute of 2 Ed. 6. concerning tithes.

Latch moved again for judgement in this case formerly spoken to, notwithstanding the exception insisted upon by Shaftoe after the Court had delivered some opinion, viz. that it was not expressed that the Parliament was held by prorogation, because it is not necessary it should be so expressed. 2ly. The Action is here brought upon the second branch of the Statute, which is, that all persons shall set forth their tithes, and the word subject is only mentioned in the first clause. Maynard on the same side said, that this mis-recital, if it be a mis-recital, affirms the Statute, and it is not a false recital, and therefore it doth not hurt.

Recitals.

Roll chief Justice, It is not good to make such recitals of Statutes in a Declaration, nor would I have any recital made hereafter more than is necessary for the gist of the Action. Shaftoe insisted upon it, That the mis-recital here is a material Exception, for the recital is not true; for it is not all one to say the Subject of the King, and to say the Subject of the then King, for the former words goe to the politick capacity of the King as King, and the latter words go to the natural capacity of his particular person. Roll chief Justice, But what say you to that which is said on the other side, That the Action is brought upon the second clause of the Statute, which is, that all persons shall set forth their tithes, and not upon the first Clause, which speaks of all Subjects of the King: And the recital here is not material to the Action. It is true, here is a mis-recital, and if the Action were brought upon the first Clause of the Statute, it would not be good, but it is not so here. Therefore let the Plaintif have his Judgement, nisi. Antea.

Trin. 1654. Banc. sup.

For an Attachment.

The Court was moved for an Attachment against the Sheriff of Staffordshire, for making a frivolous return of a Habeas Corpus, viz. That the Committee for poor prisoners had ordered, he should not bring the body till they had consulted with the Lord chief Justice. Roll chief Justice, Take an Alias habeas Corpus, with a pain of 80 l.

Rovye

Roby and Twelves.

Trin. 1654. Banc. sup.

Trin. 1652. rot. 502.

In a special Verdict in an Ejectione firmæ, it was found, that there was a custom within the Manor of Castle Dunnington, that any Copyholder of that Manor may make a writing in the nature of a Letter of Attorney to two Copyholders of the same Manor, to surrender his Copyhold after his death. The question was, whether this was a good custom or not. Aleyn argued for the custom, that it was a good custom; because such customs are not to be governed by the rules of the Common Law, but by the rules of natural reason, and are considerable in themselves, and such customs may restrain the Common Law, and the Common Law doth tollerate them. And this custom that gives power to make this surrender after the Copyholders death, is not unreasonable, for the power given is not countermanded by his death, no more than an Attorney is restrained by his masters death to act in the cause. And in Butler and Bakers case, by the delivery of a deed after the death of the party, the estate may pass by Attorney, and so although here be but a bare power given, yet it is well executed, notwithstanding his death that gave it. 2ly. This Letter of Attorney was not countermandable by the Copyholder himself during his life, and therefore it shall not be countermanded by his death, and though it had been countermandable during his life, yet it being not countermanded by him in his life, his death shall not countermand it, and the custom doth strengthen this power. Next, this custom is not contradictory, for here is no Attorney made, but a writing made in the nature of a Letter of Attorney, and a power to surrender given by it, and it is no more than for one Copyholder to surrender for another, which is usual, and in Cooks 9 Rep. f. 76. A Copyholder is called an Attorney; also Copyhold estates are made by customs, and therefore such customs which are to confirm estates are to be favoured in Law, although they do differ from conveyances of estates at the Common Law, and this custom is not only reasonable, but convenient also for the passing of Copyhold estates. And this custom enlarges the power of alienations, and such customs have generally been admitted good, though different from the Common Law; And when a custom is become a Law it is very dangerous to alter it, and the doing of it would overthrow many estates. Ellis Sollicitor General on the other side argued, That the custom is not good, because it is against the rule of Law, That an authority given should survive the party that gave it, and a custom cannot strengthen it, for a custom ought to be reasonable, and agreeing to the nature of the thing which it concerns, otherwise it cannot be good, for Ratio est formalis causa consuetudinis, Dalisons Rep. 32. 1 Instit. f. 59. And this cause cannot be reasonable, because it cannot give an authority to another to do such a thing for him after his death, which he could not do during his life; And this custom doth purely destroy the nature of the Common Law, and therefore cannot be good; And it is against the very nature of an authority to survive, and so consequently it is against the nature of the thing, Dyer 357. 10 E. 3. f. 5. 18 Rep. Vynyers case. The party in his life time might have revoked this authority, and therefore his death doth revoke it; and by the death of the Copyholder the Copyhold is descended, and cannot be surrendred by a dead man, and here was no in-

Special verd & in an Ejectione firmæ.

incoation of the eſtate of the party that is dead, and I hold there is a difference betwixt a will and an authority; And alſo here the Letter of Attorney is not purſuant to the cuſtom, and therefore it is a void Letter of Attorney, 16 Iac. rot. 530. Greenwood and Onſlaes caſe. Cuſtoms are to be taken ſtrialy, and to be ſo purſued, and it is not ſo here, for here is an addition to the cuſtom, and this makes all void. Roll chief Iuſtice, Copyholds are much led by the cuſtoms of the Manor, and, me thinks, here is little difference betwixt ſurrendring into the hands of another Copyholder, to make a ſurrender for him, and this caſe, and the variances are not ſo conſiderable as to make it void here. The Court would adviſe. At another day the caſe was again put, and the Court delivered their opinion, that the cuſtom was good; and Roll chief Iuſtice ſaid, that the death of the party doth not revoke this writing made in the nature of a Letter of Attorney, for it is ſtrengthned by the cuſtom, and it is not like an ordinary Letter of Attorney which becoms void by the death of him that made it, for this cuſtom is a Law, and the authority here ſurvives, as an Executor may ſell the Teſtators lands, if he be impowered to do it by the will, and therefore the Cuſtom is good, and let the Plaintif have judgement, niſi, &c.

Copyhold.

Cuſtom

Revocation.

Authority. Executor.

Child

Trin. 1654. Banc. ſup.

That the Defendant might not plead to the Action.

AN Action upon the Statute of 5 Eliz. was brought for uſing a Trade not having ſerved an Apprentiſhip in it. Serjeant Fletcher moved that the Defendant might not be compelled to plead, becauſe he ought not to be ſued out of the County where he uſeth the Trade. Roll chief Iuſtice, proceed according to Law, and plead this matter, or move it in arreſt of Judgement, for we will make no rule.

Rule.

Trin. 1654. Banc. ſup.

Where an Action on the Caſe lies, and where not.

BY Roll chief Iuſtice, an Action upon the caſe doth not lie againſt one for cauſing another to be indicted for a Treſpaſs, but for cauſing one to be indicted for a thing which deſerves corporal puniſhment, or a thing which ſounds in ſcandal of the party indicted, an Action upon the caſe will lie. Nota.

Stevens againſt Ask.

Mich. 1654. Banc. ſup.

Action on the Caſe for words. Arreſt of judgement. Adjective words.

STephens brought an Action upon the caſe againſt Ask for theſe words, Thou art a common Baſtard-bearing Whore, and hadſt two Baſtards by a Butcher, and I will prove it. Upon not guilty pleaded, and a verdict found for the Plaintif, Twiſden moved in Arreſt of Judgement that the firſt words, viz. Thou art a common Baſtard-bearing Whore are not actionable, becauſe they are adjective words, and are not poſitive; And for the other words they are not actionable, becauſe they were ſpoken of a Feme Covert, who cannot have a Baſtard. Upon this the judgement was arreſted till the next Term, and then Wild moved for judgement, for that he conceived that the words taken together are actionable, and cited Owen 9 Levons caſe adjudged in this Court to prove it. Roll chief Iuſtice, If the were

were married at the time of the words spoken she could not have a Bastard; but yet why should not the words be actionable, for the words purport that she was not maried when she had the Bastards, and the Jury hath found for the Plaintif. Therefore let her take her judgement, nisi.

Barker and Weston.

Mich. 1654. Banc. sup.

The Court was moved that the bail to an Action might be discharged, because they had now brought in the principal, and it was but one day after the return of the writ. But Roll chief Iustice answered, that it may not be, because they come in upon the return of the second Scire facias. To discharge Bail.

Harvey and Mountney.

Mich. 1654. Banc. sup.

In this Case the Action being a Trespass and Ejectment, and the title concerning Hugh Audley of the Inner Temple, the Defendant was by rule of Court, at the tryal, which was to be at the bar, to appear and confess the lease, entry, and ouster, and to stand upon the title only, yet at the tryal he would not appear, upon which the Plaintif was non-suite, and yet the judgement was for the Plaintif upon the rule, and he was ordered to pay the Jury. Nota. Plaintif non-suite and yet judgement for him.

VValkenden and Haycock.

Mich. 1654. Banc. sup.

Upon a Verdict given for the Plaintif in an Action upon the case for these words spoken of a Millener in London, viz. Thou art in a breaking and decayed condition, and I will prove it, and if you question me, I will prove it to your disgrace. Twisden moved for judgement for the Plaintif, because he held the words are actionable; for by the speaking of them the Plaintif is disgraced in his profession; for in common understanding the words amount to as much as if he had said that the party is a Bankrupt, and it is so averred in the Record, and found by the Jury, and he cited Mich. 1651. Tayler and Keilers case, and Smith and Rookes case, 24 Car. Wild on the other side said, that the words are not actionable, for they are adjective words, and of an incertain signification, for the words may as well mean that he is broke or burst in his body, as that he is a Bankrupt or broken in his estate; and there is no averment that the words were spoken in the hearing of tradesmen, and though they were, yet they may not tend to his disgrace, for a Tradesman may be in a decaying condition, in respect of what he hath formerly been, and yet have stock enough left to trade withall. The Court then enclined that the words were actionable, but for that time gave no judgement; but the case being moved again the same Term, judgement was given for the Plaintif. Action upon the case for words. Adjective words. Iudgement.

Lawrence and Harrison.

Mich. 1654. Banc. sup.

Action upon the Case for breach of trust.

AN Action upon the Case was brought by Lawrence against Harison his Attorny for delivering a Fieri facias against him, in the suit wherein he was Attorney for him, to the Under-Sheriff, and procuring it to be executed against him, contrary to the trust reposed in him. Upon not-guilty pleaded, and a verdict found for the Plaintiff, It was moved in arrest of judgement for the Defendant by Windham, That there appears not in the Record to be any combination between the Defendant and the Plaintiffs adversary against his Clyent, and so no breach of trust appears to ground the Action upon. 2ly. Here being a judgement in the Case, the suit in which he was entertained to be Attorny is ended, and consequently the trust reposed in him is determined, and so no breach of it, for he is now discharged from being Attorney, and the Plaintiffs averring the contrary doth not alter the Law, and besides, this delivery of the Fieri facias is in pursuance of Justice, which since that the suit is ended cannot be called a breach of trust. Roll chief Justice, But you did not only deliver the Writ against your Clyent to the Under-Sheriff: but did also procure it to be executed against him, which shews there was a combination against him. The only question is, whether the Warrant of Attorney be determined by the judgement given in the suit wherein he was retained; and I conceive it is not, for the suit is not determined, for the Attorney after the judgement is to be called to say why there should not execution be made out against his Clyent, and he is trusted to defend his Clyent as far as he can from the execution. Therefore let the Plaintiff have his judgement, nisi, &c.

Whether a Warrant of Attorney determined.

Judgement.

Roungs and Woodyard.

Mich. 1654. Banc. sup.

Action of the Case for words against a Farmer.

ROungs a Farmer in the Country brought an Action upon the Case against Woodyard for speaking these words of him, You are a Beggar, and a Banckruptly Fellow, and if every one had his own, you are not worth a Groat. Sergeant Fletcher moved in arrest of judgement that the words are not absolute and positive words, but are spoken adjectively, and also they are not spoken of a Merchant, or of one that gets his living by buying and selling, and so are not scandalous: for a Farmer cannot be a Bankrupt, and here is no dammage to the party by the speaking of them. Roll chief Justice, Though it appear not that the Plaintiff is a Tradesman, yet here appears to be a particular dammage to him by the speaking of the words, viz. that by reason of the speaking of them he was discredited with his Landlord, and his Landlord had given him warning to be gone out of his Farm, and it matters not though the words generally considered are not actionable. Therefore shew cause Saturday next why the Plaintiff shall not have his judgement.

Particular dammage.

Jones

Ienes and Graves.

Mich. 1654. Banc. sup.

AN Action upon the Case was brought by Ienes against Graves for entring upon the possession of a Term, after he had recovered it by a verdict given for him. Upon not-guilty pleaded, and a verdict for the Plaintiff, it was moved in arrest of judgement, that the Plaintiff hath not shewed that there was any Term continuing in him at the time of the Defendants entry into the Land, for though the Term might have a continuance at the time of the recovery, yet it may be ended at the time of the Plaintiffs entry into the Land. 2ly. It is not expressed when the entry was, and so it appears not whether it was before or after the recovery, so that it cannot be known, whether the Plaintiff hath cause of Action or not. Latch also doubted, whether this kind of Action ought to be in this Case or not, and whether he ought not to have brought an Action of Trespasse, and not an Action upon the Case. Roll chief Iustice, He may bring an Action upon the Case, or an Action of Trespasse at his own election. Wild on the other side held, that the Declaration was good enough, for by it there appears to be good cause of Action, for the time of the entry is expressed, viz. that it was after the recovery. 2ly. The entry is found to be vi & armis, which implies an unlawfull entry, and so the Jury have found it to be, viz. that he is put out of his possession recovered. Roll chief Iustice, Though the Plaintiff had no title, yet he had a possession, and it is actionable for the Defendant to disturb him. Therefore let the Plaintiff have his Iudgement, nisi, &c.

Action upon the Case for entring upon the possession of a Term.

Election of Action.

Implication.

The disturbing a possession actionable.

Mathew and the Hundred of Godalming in Surrey.

Mich. 1654. Banc. sup.

IF a Carriers man or Son conspire to rob him, and accordingly do it, the Carrier not being privy to it, The Carrier may bring an Action against the Hundred, upon the Statute of Winchester for this robbery, but this conspiracy may be urged in mitigation of dammages. Per Roll chief Iustice, In a Tryal at the Bar, between one Mathew, and the Hundred of Godalming in Surrey.

Action upon the Statute of Winchester against a Hundred.

Mitigation of dammages.

Hacker and Newborn, a Sussex Cause.

Mich. 1654. Banc. sup.

IF a Man make his Will in his Sickness, by the over-importuning of his Wife, to the end he may be quiet, this shall be said to be a Will made by constraint, and shall not be a good Will. By Roll chief Iustice, In a Tryal at the Bar in the Case of one Hacker and Newborn, Mich. 1654.

What shall be a Will by compulsion.

Bronge and More.

Mich. 1654. Banc. sup.

Arrest of judgement in a Replevin.

MAster Sollicitor general moved in arrest of judgement in a replevin, and took these exceptions to the avowry. 1. That the party did avow the taking of the Cattel damage-feasant in a Common, where he had Common, and doth not shew that he hath Common for his Cattel levant and couchant. 2ly. He doth not shew, that he was dampnified by the Cattel that were distreyned damage-feasant, and it may be there was common enough for him notwithstanding the other Cattel distreyned were there, and so he was not dampnified by their being there. Roll chief Iustice answered, if one who hath no right to Common do put his Cattel upon the Common, he who is a Commoner may take the Cattel damage-feasant upon the Common, and it is not necessary for him to aver, that he hath dammage by them, for he hath an interest which doth authorise him to remove the nusance, but he must make a Title to the Common, and if he have made it here but by implication, it is well enough: for it is now helped by the verdict, and you have passed over your advantage by not demurring to him.

What distress lawfull without averment of dammages.

Interest.

Title by implication.

Mich. 1654. Banc. sup.

A Deed good in part, and fraudulent in part.

BY Roll chief Iustice, A Deed may be fraudulent in part, and good in part, and so he said it had been adjudged in the Case of one Lydal of the Middle-Temple.

Banks and Pratt.

Trin. 1654. Banc. sup.

Hill. 1653. rot. 603.

Error in an action of the Case by an Attorney for fees and solliciting.

PRatt brought an Action upon the Case against Banks upon an Aumpsit, to pay him such fees as should be due unto him as his Attorney in prosecuting a suit for him in the Common-pleas, and such monies as he should lay out in soliciting a suit for him in the Chancery, and upon non-assumpsit pleaded, a Verdict was given for the Plaintiff, and a judgement thereupon. The Defendant brought a Writ of error in this Court, and assigns for error, that the Plaintiff did not shew particularly what sums of mony he had laid out for him, nor to whom he had paid it, as he ought to do, and Tooke and Sir Thomas Walsinghams case in this Court was cited to prove it. 2ly. The Assumpsit was that he should pay him his fees, so long as he should continue to be his Attorny, & it appears not that he continued to be his Attorny in the suit wherein he supposeth he prosecuted for him. But for the first exception Roll chief Iustice said, that it is not necessary to set down particularly, the several sums of mony he had laid out, for this might make the Declaration tedious, and if the Plaintiff should (as it is objected he may) bring another Action for some part of the monies recovered in this suit, you may plead this recovery generally in bar of such Action. And as to the 2d. exception it shall be intended, that he did continue to be his Attorney if it appears, as it doth, that he prosecuted for him. The case was moved again the next Term,

A general Declaration good.

Intention.

Term, and the former exceptions only insisted upon. But Roll chief Iustice over-ruled the exceptions, and affirmed the Iudgement. Antea. Iudgement affirmed.

Mich. 1654. Banc. sup.

The Court was moved, that two that were bayl for one in an Action might be discharged and two others accepted of, because the party was to examine them as Witnesses in the Cause, which was granted upon consent of the parties. To change the Bayl.

VVise and Jeffryes.

Hill. 1654. Banc. sup.

Mich. 1654. rot. Q.

VVIse a Corn-Merchant and a Baker in London brought an Action upon the Case against Ieffryes for speaking these words of him, viz. Thou art a broken fellow, and hast cheated me of 200 l. Upon a verdict for the Plaintif it was moved in arrest of Iudgement, that the words are not actionable, because the words are adjectively spoken, and are not positive words, nor of a certain signification, for they may be meant that he was broken in his body, and not in his estate. But VVild answered, that 1. The words are spoken of a Tradesman, which may be a Bankrupt; and 2ly. Here is an averment that the words were meant to signifie that the Plaintif was a Bankrupt, and besides here is a verdict for the Plaintif. Green replyed, that it doth not appear that the words were spoken of him in relation to his Trade or Profession, and to say, that thou hast cheated me, were adjudged not actionable in Hills case, 2 Car. and in one Iohnsons case. Roll chief Iustice, I do not agree the Case of 2 Car. cited, but to the Case in question, take all the words together as they are laid they imply he is broken in his Trade, and the word cheated enforceth this sense, and the words are very scandalous, and the averment, and the verdict makes it more strong. Therefore judicium pro querente, nisi, &c. Action for words brought by a Corn-Merchant. Adjective words. Iudgement.

Fowkes and Copsye.

Hill. 1654.

IT was said in this Case, that if there be divers breaches of an Award, upon may assign but one of them in an Action brought for breach of the Award. One breach of an Award assignable.

Michill and Hepworth.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 717.

A Writ of Error was brought to reverse a Iudgement given in the Common-pleas in an Action of Trespas for an Assault, and taking away of the Plaintifs Goods, and amongst other for taking away of Writ- Error in Iudgement in Trespas,

tings, and two Errors were assigned, 1. That the Declaration was with a quod cum, which was said is not good in an Action of Trespass. 2. That the Plaintif did not set forth what the writtings were which were taken away; but the first exception was only relyed upon, and to that Roll chief Iustice, answered, That if the Action were an Action of Trespass upon the case, though it were with a vi et armis, it might be good with a quod cum, but the Action here is a meer Action of Trespass vi et armis, Therefore shew cause why the Iudgement shall not be reversed.

A quod cum not good in in Trespass. Otherwise in Trespass on the case.

Kirk and Lucas.

Hill. 1654. Banc. sup.

Hill. 1653. rot. 579.

Kirk brought an Action of Accompt against Lucas, the Defendant Lucas pleads ne unques receptor, and upon this Issue there was a verdict for the Plaintif, that the Defendant shall accompt, whereupon Auditors being assigned, he pleads before them in discharge of the Accompt. that he received the money of the Plaintif to deliver over, and accordingly he had delivered it over; The question was whether this plea pleaded before the Auditors was a good plea in discharge of the Accompt. Twisden said, It was not a good plea in discharge of the Accompt before the Auditors, but it had been a good plea in bar of the Action, and here it is not shewed that there was any direction given to pay the money over. Roll chief Iustice, If he plead that it was paid by his consent it is a good plea before the Auditors, and this is a good plea in bar if the money be paid accordingly, Therefore take your judgement, nisi.

What shall be a good plea in an accompt before Auditors.

Iudgement.

The Protector against Richardson.

Hill. 1654. Banc. sup.

A Writ of Error was brought by Richardson to reverse a judgement given against him, being by profession a Tayler, upon an information of extortion exhibited against him at Oxford, at the Assizes there, for taking more money of one that bound himself Apprentice with him, than by Law he ought; and the Error assigned was, that the Iustices of Assize have no power to determine offences of this nature, and Metcalfs case 11 Rep. was urged, and the Statute of 22 H. 8. C. 5. and 28 H. 8. C. 5. But Crook Seignior answered, That as they are Iustices of Oyer and Terminer they have power by their Commission to determine offences of this nature, and it shall be intended they proceeded here by virtue of that Commission, and in 7 Eliz. in Dyer it is a quære whether the Statute be meant of the Courts at Westminster, or no, and it would be inconvenient if the Iustices should not enquire of such offences at the Assizes, and he cited Gregories case, and Cooks Iurisdictions of Courts, to prove they have authority Roll chief Iustice, But it appears not here by vertue of which of their Commissions you have tryed the offence; but you have jumbled the Commissions together in the Record, and they have not authority by all their Commissions; and besides there is another fault in the judgement, for it is not said it is considered by the Court, but only it is considered. By the Statute of 22 H. 8. the Iustices of Assize by vertue of their Commission

Error upon a Iudgement upon an Information for Extortion.

Certainty is required.

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on of Oyer and Terminer, have power to try divers offences, if they be not restrained to certain Courts; but for the reasons aforesaid, shew cause why the Iudgement should not be reversed.

Protector and Cartwright.

Hill. 1654. Banc. sup.

IT was moved on the behalf of Cartwright that he might have allowance of his Plea confessed by Mr. Attorney general pleaded to a quo Warranto brought for the Protector against him for certain liberties which he claimed within the Manor of Ossingham in Nottinghamshire; the Exception to the plea was, that he claimed the Assize of Wine, to which it was answered, that it is intended only of the measures for Wine, and that the Plea had been read and examined by Iustic: Ask. Roll chief Iustice, Lee Iustice Ask examine it again. For allowance of a plea confessed by the Attorney general.

Tost and Daye.

Hill. 1654. Banc. sup.

Trin. 1653. rot. 547.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case brought against a Sheriff for restoring of goods taken in Execution to the party from whom they were taken, and for endorsing of nulla bona upon the writ of Execution, and delivering over the writ so endorsed to the new Sheriff his Successor. The Errors assigned were these. 1. It is not said in the Record that he returned nulla bona, but only that he endorsed nulla bona upon the writ. 2ly. It is said that he delivered the writ thus endorsed to the new Sheriff, but doth not shew that the writ was delivered over by Indenture betwixt the new Sheriff and the old, to be returned by him. 3ly. It appears not whether there were any return at all made of the writ by the new Sheriff or the old. And 4ly. The Action is not laid in the County where it ought to be, for it is neither brought in the County where the writ was indorsed, nor where it was delivered over. Latch answered, that the Action was brought for re-delivering the goods taken in execution back again to the party, and not for the endorsing of the writ, and delivering it over to the new Sheriff. But the Iudgement was reversed, nisi, &c. Postea. Error to reverse a judgement in an action upon the Case. Iudgement reversed.

Porter and Swetnam.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 393.

IN this Case upon a writ of Error brought upon a judgement given upon an Action of Covenant for not paying of rent reserved upon a Lease for years by Indenture, After the opinion of the Court was delivered that the words yielding and paying in the Indenture made an express Covenant, and were not a bare Covenant in Law, and that an Action of Covenant did well lie upon them, the writ of Error was quashed for a defect in form. Error in Covenant. Expres Covenant. Writ of Error quashed, and judgement affirmed.

in it, and a new writ of Error brought, and thereupon the judgement was again prayed to be affirmed, which was done, nisi, &c. Nota. Antea.

Hill. 1654. Banc. sup.

Habeas Corpus.

Indictment. Action upon the Case.

THe Court was moved for a Habeas Corpus to remove a Prisoner in Northampton Gaol, that was convicted of felony, and had been burnt in the hand, upon an Affidavit that the Gaoler used him harsly. But Roll chief Iustice answered, that it could not be, but they might either endict the Gaoler, or bring an Action against him.

Hill. 1654. Banc. sup.

For a new Tryal.

The Iuries mildemeanor spoils not the Verdict.

THe Court was moved upon an Affidavit for a new tryal, because the Jury were not kept together till they had given their verdict, as they ought to be. But Roll chief Iustice answered, this is a misdemeanor, yet the verdict is a good verdict notwithstanding, yet we will hear the Councel on both sides before we conclude any thing: The same Term Iudgement was given, upon another motion made for a new Tryal.

The Protector and Lowr.

Hill. 1654. Banc. sup.

To quash an Endictment.

Denied.

BArton moved to quash an Endictment preferred against Lowr at the Assizes at Cornwall, for speaking of scandalous words against the Parliament; The Exception taken was, that it did not appear in the Endictment that the Parliament was sitting at the time when the words were spoken. But Roll chief Iustice answered, It appears not to us but that the Parliament was sitting at the time; and peradventure it will be made appear at the tryal. Therefore plead, and go to tryal, and then move in Arrest of judgement if you have any thing to move.

Page and Parr.

Hill. 1654. Banc. sup.

Trin. 1654. rot. 1687.

Covenant upon an Indenture.

Suspension of ren.

Nil capiat per Billam.

PAge brought an Action of Covenant upon a Covenant conteined in an Indenture of a demise for years, for the not paying the rent reserved by the Indenture, according to the Covenant. The Defendant pleads in bar that the Plaintif entred into part of the land demised before the rent due, for which the Action was brought, and so had suspended his rent: The Plaintif replyed, the Defendant did re-enter, and so was possessed as in his former estate, and to this replication the Defendant demurred, and for cause he shewed, that here was no confession and avoidance, or traverse of the plea in bar. Roll chief Iustice, Have you shewed that he continued in possession until the rent grew due; for you ought to shew that he entred and was possessed until after the rent-day, but here you have only said that he was possessed in his former right, Therefore nil capiat per Billam, nisi.

Hill.

Hill. 1654. Banc. sup.

VPon an Affidavit read in Court, that 20 l. costs were tared upon a non-suite in an Action of Trespass and Ejectment brought to the Bar, and that the Plaintif had not payed them, nor was to be found, and yet had brought another Action for the same land, The Court was moved that the Defendant might not be ruled to plead to this second Action, until the Plaintif had paid the costs tared upon the former non-suite, and that another Plaintif might be named, or that security might be given to pay the costs if the Plaintif should be non-suite again. The rule was to shew cause why it should not be so.

Not to plead till costs paid assessed in a former Action.

Shew cause.

Hill. 1654. Banc. sup.

DArcy moved that an Endictment of Michaelmas Term last might be amended in the Caption. But Roll chief Iustice, answered, It cannot be if it be of the last Term, but had it been an endictment of this Term it might have been amended.

To amend an Endictment of a former Term denied.

Hill. 1654. Banc. sup.

THe Court was moved to quash an Endictment for entring forcibly upon a Tenant for years, against the Statute of 21 Iacobi, and the Exception was, that the Endictment doth not say that he entred manu forti. Roll chief Iustice answered, The Statute is only, that if one enter by force; and the words manu forti are not expressed in the Act, Therefore move it again if you will.

To quash an Endictment.

Hill. 1654. Banc. sup.

A Habeas Corpus cum causa was granted for Elizabeth Bayne, to the intent to charge her with an Action, and upon the return thereof she was committed to the Mareschal. Wild moved that she might be discharged, because the return of the Habeas Corpus is erroneous. But Roll chief Iustice answered, It could not be; whereupon he moved for another Habeas Corpus for her ad subjiciendum to be directed to the Mareschal, which was granted.

To discharge a prisoner turned over to the Mareschal.

For a habeas corpus ad subjiciendum.

Hill. 1654. Banc. sup.

THe Court was moved to quash an Endictment preferred against one for practising Phisick, not being skilfull in the profession, and not having a License to practice from the College of Phisicians. The Exceptions were, 1. That no Endictment at the Common Law lies for the offence supposed to be committed, for it is not an offence against the Common Law, and 2ly. an Endictment upon the Statute lies not, and so no Endictment lies, And upon these Exceptions it was quashed.

To quash an Endictment for practising Phisick without licence.

The Protector and Hart.

Hill. 1654. Banc. sup.

To remand a prisoner appearing upon a Habeas Corpus, and turned over. Denied.

One Hart committed to the Gatehouse appeared in Court upon the return of a Habeas Corpus granted for him, and upon the prayer of his Counsel the return was filed, upon which it was moved on his behalf that he might be remanded to the Keeper of the Gatehouse, and not turned over to the Mareschal, to the intent to save his fees, but the Court said it could not be, because upon filing of the return there ought to be entred upon it a Committitur to the Mareschal, whereby he becomes his prisoner.

Torret and Frampton.

Hill. 1654. Banc. sup.

Trin. 1653. rot. 178.

Special verdict upon a Devise.

Upon a special Verdict the Case was this, A man deviseth his lands to his wife for her life, the remainder to A. B. and C. and their heirs respectively for ever. The question was whether A. B. and C. were joynt tenants, or tenants in common. Serjeant Twisden held, that they were joynt tenants, and that this case differs from Radcliffs case, and cited Wilds case in the 6 Rep. that a Will must be clear and conspicuous, but so it is not here, and here is no enforcement by these words respectively, and they do relate to the persons, and not to the lands bequeathed, and a Covenant made by three respectively is a joynt Covenant, and not a several Covenant, and the word respectively hath relation to the survivorship which may happen betwixt the parties, and a devise to one and his heir is a fee-simple. Latch, For the Defendant held, that here is a tenancy in Common, and not a joynt tenancy, for the Estate ought to be whole out, either a tenancy in Common, or whole out, a joynt tenancy, and this of necessity; for there cannot be a joynt tenancy for life, and several inheritances in the remainder, and Littletons ground proves this to be so. And 3dly. It is against all construction to be otherwise, as the word respectively is here placed, and Ratcliffs case, which is not so strong a case as this case proves it to be so, and although the word respectively may sometimes make a distribution of heirship; as hath been objected, viz. of several heirships; yet here the placing of the word respectively shews it cannot be so, and this using of the word is not operative, but idle, if here should be a joynt tenancy, for the law says as much, though the word respectively were left out, and the word would be the more idle in explicating a thing so obvious to common understanding, and no ways doubtfull, and therefore we cannot think but that these extraordinary words do enforce an extraordinary construction, and not a common one, and an idle application; and this comes not within the rule objected for the certainty, for this word hath a proper meaning to make a several distribution, which makes it certain enough, & the word is used here absolutely, & shall be so taken in 3 Car. Iaques and Thorowgoods case in the Common pleas, the word equally was taken operatively, and not in common construction, and in Lewin and Dods case in the Common pleas, 36 and 37 Eliz. the word equally was held by two Judges to make a joynt-tenancy, and not a tenancy in common; and in this Court also the Judges were divided at the first; but afterwards

Whether joynt-tenancy or a tenancy in common.

Distribution of heirship.

Operative words.

Pop.

Popham changed his opinion, and it was adjudged a tenancy in common, and afterwards a writ of Error was brought in the Exchequer Chamber, and there the judgement was affirmed, Pasch. 41 Eliz. B. r. rot. 270. Also the subject matter here is apt to receive a tenancy in common, here being intended a provision for children, and their several posterities, which a survivorship would destroy, 37 H. 8. Bro. Devise 29. and the very intent of the Devisor appears in the will to be as I have argued. Roll chief Justice, I hold here is a tenancy in common, and that it shall goe throughout, and is not to be divided, and the intent of the devisor appears in the will that every one shall have his part, and their heirs, for here is a provision made for Children, and the word respectively would be idle, if another construction should be made, and would signifie no more than what the law said without it. Ask and Newdigate ad idem, and Newdigate cited Dyer 3. 6 Huntlyes case, so judgement was given for the Plaintif, nisi.

Words not to be construed to make them idle.

Judgement for the Plaintif.

Shepheard and Gray.

Hill. 1654. Banc sup.

Trin. 1654. r. 672.

A Writ of Error was brought to reverse a judgement given in an Action upon the Case in the Court at Doncaster, and the Error assigned was in the judgement, which was entred thus, and the said Shepheard, to wit the Defendant, shall be in mercy of W. Gray, to wit the Plaintif. Roll chief Justice, This is erroneous, for he ought not to be in mercy of the Plaintif, but of the State, Therefore let the judgement be reversed.

Error in Action upon the Case.

Reversed.

Lamplew and Hewson.

Hill. 1654. Banc. sup.

After a verdict in an Action upon the Case brought for these words, viz. I was never a Traytor to the State as you have been: It was moved in Arrest of Judgement by Turner for the incertainty of the Declaration, for that it appears not thereby that the words were spoken of the Plaintif, or to the Plaintif, and because it is not said that the words were spoken falso et malitiose. Shafto of Councel on the other side answered, that it appears the words were spoken upon conference betwixt the parties, and thereby doth appear a sufficient averment, that the words were spoken of the Plaintif. Roll chief Justice, The Declaration implies that the words were spoken falso et malitiose, & ther nèds not an express averment that they were so spoken, as there ought to be in an Endictment, and this Declaration is laid two years after the words were spoken, Therefore take your Judgement except better matter be shewn.

Arrest of judgement in an Action for words.

Implyed averment good.

Judgement.

Hill. 1654. Banc. sup.

A Forein plea, which is to out the Court of the Jurisdiction in the cause depending ought to be sworn to be true, or else is not to be allowed by the Court. So ruled by the Court.

To swear a forein plea.

Dod and Herbert.

Hill. 1654. Banc. sup.

Trin. 1655. rot. Q.

Debt upon an Obligation to stand to an Award.

DOd brought an Action of Debt against Gregory Herbert an Attorny of this Court upon an Obligation to stand to an Award. The Defendant pleads no Award made. The Plaintif replies and sets forth the Award, which was, that the Defendant should pay unto the Plaintif 100 l. at two several dates of payment, and assigns the breach in not paying the 100 l. accordingly. To this replication the Defendant demurs, and the exception taken was, that it doth not appear in the Award, that the Award is reciprocal: but that is only made on one part. It is true by the allegation in the pleading it doth appear: but this helps it not, for it ought to appear in the Award it self. Roll chief Justice, the Award appears to be made de & super præmissis, and that may help it. But the Plaintif hath not well assigned the breach, for the breach is not assigned upon a good part of the Award, for there is no cause set forth in the Award why the Defendant should pay the 100 l. Therefore nil capiat per billam, nisi, &c.

Award de & super præmissis.

Breach not well assigned

Henly and Baynton.

Trin. 1654. Banc. sup.

Trin. 1654. rot. 1384.

Arrest of judgement in an Action upon the Case for words.

HEnly brought an Action upon the Case against Sir Edward Baynton, for speaking of these words of him, viz. You have cousened the State of 20000 l. and I will prove it, for you have received five and twenty thousand pounds profits of the Office, and not compounded for it, and have foisted in words into the order for your composition. After a verdict found for the Plaintif, it was moved in arrest of Judgement, that the words as they are laid in the Declaration are not actionable: for the Plaintif doth not entitle himself to the Office, but only to eleven parts of the profits of the Office, and so he cannot be scandalized by the words as an Officer, 8 Hob. 267, 268. Sir Miles Fleetswoods case was cited, and Hob. 76. Bray and Humes case, and 4 Iac. Cars and Rans case, and Hill. 14 Iac. Snails case, and 20 Iac. Curle and Tucks case. 21y. Here is no averment that Whitwick during whose life he claims the office was alive when the words were spoken, and if he were dead then he was no officer. And the subsequent words do qualifie the former part of the words, for the receiving of the mony is not an offence or cosening of the State, 14 Iac. Godard and Gilberts case in the Common-pleas, and for the word foisting it is an insensible word, and therefore cannot be actionable, and the Plaintif doth not aver, that he did not foist in words into this order, but only sayes, he did not foist in words into any order. And though the words were actionable, yet at the time when the Action was brought Henly was pardoned by the Act of Oblivion if he had done it, and so could not be damnified by the Defendants speaking the words if they were true, and so no Action lies, for no dammages could be recovered, Hob, 82. 294. Chuddington and Wilkins case, 1 E. 3. 3. 12 Eliz. Bartons case, 20 Ass. Pl. 7. 6 Rep. 13. 16 Iac. Serles case. Shafto on the same side urged, that it appears not by the Declaration that Henly was an Officer, or that Sir Edward Baynton knew him to be so, and so here is an ill inducement

Insensible word.

No Action where no dammages.

ment, and Sir Miles Fleetwoods case is, that he ought to know that he was an Officer, and there the words were positive and certain, but so they are not here; nor do relate to his Office and the words are to be construed as they lye together, and so some of them are of a very ambiguous construction and uncertain, and others of them are insensible, and an averment cannot make senseless words to be sense. And in the case of Curle and Tuck, 20 Iac. no judgement was ever given, and yet that was stronger than our case. It was also urged by Powis on the same side, that it appears not that the money spoken of did belong to the State, or was to be compounded for, for it may be he received the monies before he was a Delinquent, and they he was not to compound for them, Hob. 323. Bradshaw and Walkers case cited. Sergeant Twisden for the Plaintif held the words to be actionable, and cited 8 Car. Culme and Denhams case, where it was adjudged, that to say a man was a cosening Knave are actionable words, and 16 Iac. Sir VVilliam Brunkers case, and Hill. 1651 Strode and Homes case in this Court, and Trin. 1653. Townesend and Barkers case; and in this Case is an instancing wherein the Plaintif hath cosened which makes it more plain, and it is also aggravated by saying he had cosened, the State, for he hath thereby incensed the State against the Plaintif; and the words in themselves are scandalous and prejudicial also, for if he hath not compounded he is no Officer, but hath lost his Office, being lyable to be sequestred, and the words here, shall be taken in sensu composito, and not in sensu diviso, for they are positive words, 8 Car. Redwood & Smiths case, and the last words are only spoken to instance the Cause of speaking of the former, and it is not material whether they be actionable or not, but the meaning of the word foisting is not so doubtfull, but is very well known, and shall be intended that he had falsely put in words into the order, and so they are scandalous as well as the former, 5 Car. Alleyns Case. And there is no necessity here to aver the life of VVhitwick as is objected on the other side, for the Office was for the life of Henly and VVhitwick, and the survivor of them, and if the averment were necessary in some Cases, yet here it is not, because Whitwick is an Officer upon Record in this Court, where the Action is brought, and seen to be alive here in Court; and besides, the Statute of 21 Iac. would help this if need required, it being after a verdict; and not upon a demurrer; and besides, here is an averment, that he hath not foisted words into this order in effect, for he hath averred, that he hath not foisted words into any order, and so consequently not into this, 2 R. 3. f. 7. 12 H. 7. f. 23. And the Act of oblivion hath not pardoned this offence, as is also objected, and though it should, yet it must be pleaded, that the party may appear not to be excepted out of it, as many are, and the Jury have here found for the Plaintif, and so it shall be intended that he is out of the Act, and he ought to have averred it before, or have given it in evidence, and so he prayed judgement for the Plaintif. Roll chief Justice, you mistake the exception, for they say that Mr. Henly is pardoned by the Act, and so cannot be damnified by the words if they were true, and so they are not actionable. Twisden, By their pleading it appears not, that Mr. Henly is within the pardon, for there are many persons excepted out of it. Roll chief Justice, But if it be so yet if the words do not relate to him as an Officer they are not actionable. Wild, The words are spoken intentionally in relation to his Office. Roll chief Justice, He was not an Officer at the time of the words spoken, for he was sequestred, and then what scandal can they be to him. Wild, The Jury hath found that he was damnified, though the words were true. The first question here is, whether the words, as they are laid, relate to his Office, for he is not an Officer, nor can the Action be brought by him as he is so, but this is not much to the purpose: but the deceit alle-

Sensus compositus et sensus divisus.

ged to be done to the State charged upon him is the cause of the Action, and it is said that he deceived the State in his composition, for his fine, and for foisting words into the order, and if he foisted not any words into any order then he did it not into this. And there is no need to aver Whitwicks life, for he could not receive the profits of the Office if Whitwick were dead, and therefore he shall be intended to be alive; and there doth dammage arise to the Plaintif by the speaking of the words, for he is in danger thereby of sequestration by such foisting of the words; and in the common understanding of the words they shall be taken to be meant of falsifying of the Committees order, and one man ought not to slander another; and say that you had not notice of the Ordinance touching which he is slandered, it is not to the purpose, for you ought to take notice of the Ordinance. Newdigate Iustice, to the same effect, that the words are actionable, for as they are laid, Henly is brought thereby within the compass of Sequestration, and the words in themselves are actionable, because they instance in what thing he cosened the State, and the subsequent words do not qualifie the former, but aggravate the matter, and I conceive it not necessary to aver Whitwicks life, but if it be, it is averred here; and so judgement was given for the Plaintif, nisi, &c.

Avermt.

Iudgement for the Plaintif.

North and Iames.

Hill. 1654. Banc. sup.

Trin. 1651. rot. 1666.

Error to reverse a judgement in Tresp. Discontinuances.

A Writ of error was brought to reverse a judgement given in an Action of Trespass in the Common-pleas upon a demurrer, the error assigned was, that there were discontinuances in the Process, and it was shewed by Howell of Councell with the Defendant in the Writ of error that this is helped by the late Statute, which sayes, that no Writ of error shall stay execution, and Iudgements upon Demurrers, as this is, are within the Statute. Roll chief Iustice, By your reason a Writ of error will not now lye for any thing. The branch of the Statute is to be intended of matter in form only, but this is matter of substance notwithstanding the branch of the Statute alleged. Therefore let the judgement be reversed, nisi, &c.

Reversed.

Yokehurst against Scott.

Hill. 1654. Banc. sup.

Hill. 1653. rot. 35.

Debt upon an Obligation, and a special verdict.

YOkehurst brought an Action of Debt upon an Obligation against Scot, the Defendant pleaded non est factum. Upon this a special verdict was found, wherein the question was, whether it was his Deed or no, because the Obligation was, that he was bound in centem libris instead of centum libris. Green for the Plaintif held it a good Bond notwithstanding this

False Orthography.

mistake, because centem doth sound like centum, and he cited many Cases to prove, that mis-writting of words in an Obligation shall not hurt it, as Hob. 34. Trigintar. for triginti, and sessanti for sexcenti and Osborns case, sewenteen for seventeen, 9 H. 6. f. 7. and Pinder and Tugges

case

case in this Court, and 2 Car. Davis his Case, and the Jury in our case have found that the Defendant did seal and deliver the bond as his Act and Deed. Roll chief Justice, The condition of the bond doth set it forth to be 1001. wherein the Defendant became bound, therefore shew cause the next Term why the Plaintif should not have judgement. Judgement.

Cooks and Chambers.

Hill. 1654. Banc. sup.

COoks moved for a Prohibition to the Prerogative Court for proceeding against him there by way of attachment for not obeying the Decree of that Court. The Case was this, Cooks and Chambers being in suit in the Prerogative Court for Letters of administration of the Goods and Chattels of one that dyed intestate, at last they agreed by consent, that Cooks upon putting in bond to perform the decree of the Prerogative Court, touching the distribution of the Intestates estate should have the administration granted unto him wherenpon he did enter into bond, and had the Letters of administration granted unto him, and afterwards the Court made an order or decree that he should distribute the estate in such and such manner, and for not-performing of this decree Chambers proceeds against him in the Prerogative Court by way of Attachment. It was urged against the Prohibition that this Court is now absolute by the late Statute, and that there is no appeal from it, and that the decree made was made by consent of the parties, and therefore it was no reason to grant a Prohibition to hinder that Court from forcing the party to perform the decree. Sergeant Twisden answered, that the consent of the parties cannot give a Jurisdiction to that Court which they had not before. Roll chief Justice, That is true, but by consent peradventure it may be as it is here, but they cannot compell them to consent, and they have no authority given them by the late Statute, but they have only their old authority, and it would be dangerous to out the old, and here is a decree made by consent of both parties: but bring us Presidents where a Prohibition hath been granted after an administration granted by consent as this is. At another day Latch moved again for the Prohibition, and said, that the attachment was granted beyond the Condition of the Bond given in Court, and they have no power to award it, notwithstanding the distribution of the estate be not made according to the bond, for the Ordinance of Paliament gives them no such authority. 2ly. They cannot order such a distribution of the estate, notwithstanding our consent, for our consent was, that the clear estate only should be distributed, and not the whole estate, and we have six presidents here to prove that they ought to proceed upon the Bond, and not as they have done, & we could have brought a hundred to the same purpose if we had thought it needfull; And their giving of us the administration upon the bond given, doth abridge them from making any order to distribute the estate, or to proceed by attachment, and Slaynyes case, Hob. f. 85. and Tucker and Loans case, Hob. 191. were cited. Wild on the other side agreed the books cited, but said, here is the consent of the parties, that the administration should be as it is here, and that agreement was before the administration granted. Roll chief Justice, Will you consent to bring an Action upon the Bond, and waive the prohibition. Answer to this to morrow. At another day it was moved again, and then Roll chief Justice answered, Proceed upon the Bond, for they cannot grant an attachment for not performing the decree, although it was made by consent. Wild replyed, This being a Decree made by

For a Prohibition to the Prerogative Court.

Administration by consent.

No Attachment.

by consent, they have submitted to it, and the attachment is granted for disobedience to the Court who made the decree, and the late Ordinance doth give them power to commit such as shall disobey the decrees and orders of the Court. Roll chief Iustice, appear, and plead to it, and try their power that way, I believe that if parties will consent that administration shall be granted in trust, it may be so granted, although it be not in the usual way, and as the Statute doth direct, but the taking of the Obligation ties them up to that remedy, and they cannot proceed by way of attachment, Therefore take a prohibition as to the attachment, and appear to it, and try the matter.

Prohibition granted.

Boyle and Scarborough.

Hill. 1655. Banc. sup.

Hill. 52. 1. 296.

Action upon the Case upon a promise and judgement upon a Demurrer and writ of Error to reverse it.

Scarborough brought an Action upon the case in the Common pleas against Boyle, upon a promise, that whereas his son William did owe unto Scarborough 500 l. and Scarborough did intend to sue a ne exeat regnum against him, to hinder him from going out of England till he might recover his debt. Boyle the Defendant did promise that if he would forbear to sue out an ne exeat regnum against his son William, he would pay the debt; Upon this Action the Plaintif obtains a judgement upon a demurrer. Whereupon Boyle brings a writ of Error to reverse this judgement. The pleading in the Common pleas was thus, the Defendant in the Action in the Common pleas was sued by the name of of Robert Boyle Esq; who appears and pleads the Statute of limitations of Actions of 21 Iac. The Plaintif replies that he took out an Original against him within 6 years out of the Chancery by the name of Robert Boyle Esq; and outlawed him upon that Original, and that afterwards the Defendant Boyle came in and reversed the Outlawry, the Defendant rejoyns and says protestando, that he took not out such an original within 6 years, for plea says, that he was a Knight at the time of the Original sued forth, the Plaintif sur-rejoyns that he came in and reversed the Outlawry upon that Original, for want of proclamation, by the name of Robert Boyle Esquire, The Defendant by way of Rebutter says, that he was a Knight at the time of the Outlawry reversed; the Plaintif by way of sur-rebuttter says, he reversed the outlawry by the name of Robert Boyle Esq; upon this the Defendant demurred, and upon the demurrer judgement was given for the Plaintif, and upon this the writ of Error was brought in this Court. The Errors assigned were, 1. That here was no good consideration for this promise, for there is no ground of Action shewed against the son, nor that he had been at any charge in the prosecuting any action against him, and Rosyer and Langdales case 1650. in this Court, and Bedwell and Cottons case Hob. 216 was cited; and 2ly. there is no such writ as an ne exeat regnum in the Register; but only a writ to give security not to go out of the Realm to the publique prejudice of the King and his people; and here is no such matter but only that he owed 500 l. and therefore he would sue out the writ, and though the consideration should be good, yet is not the Plaintifs replication good to tye the second writ to the first, for he doth not say that the second is pro una et eadem causa, and so it is incertain, Brook Trespas 85. 9 H. 6. and there may be several promises made here in one day, and if the replication be good, yet the rejoynder is good, 19 H. 8. 43. He only ad-

Consideration to ground a promise.

Ne exeat regnum.

Rejoynder.

admits that he being a Knight is the same person which was sued by the name of an Esquire, Hob. 171 Stukelyes case. And here is a judgement by a nihil dicit, and no warrant of Attorney, for it is in latine, which being since the Act for Law proceedings to be in English, is not good, and so it was prayed the judgement might be reversed. Latch on the other side prayed to affirm the judgement, and he argued, 1. That here was a good consideration to ground the promise upon, for this writ of ne exeat regnum may be sued forth by any one, & here is a benefit to the party in the forbearing to sue it forth, and here is good cause to move for this writ, and it is in the discretion of the King to grant it or not, but it concerns him in his honour to grant it, Regist. 193, 194. Brit. 182. Cooks instit. 130. There is caution to be taken of persons licensed to go beyond Seas, that they pay their debts. Warrant of Attorney.

2ly. The replication is good, and it is not necessary to aver that the second Original was for the same cause; first, because it is in an action upon the case, and is set forth at large, which shews verbatim that it is for the same cause, and is plain in it self; and 2ly. it is said that he sued out the second Original pro causa prædicta, which is a sufficient averment, if an averment be necessary, and the variance in the damages argues not that there is another cause of Action, for when the second Original was sued forth, the damages were increased by increase of time, it being a year after the suing forth of the first; For the rejoynder it is to be considered, 1. Whether the party be estopped thus to plead. 2ly. If he be not, yet whether the matter set forth be good. For the 1. I hold he is estopped by coming in gratis as an Esquire, to say that he was a Knight, and he not being brought in custody, Dyer 192. There he shall plead no other name; but here he hath not alleged it as he ought, for he ought to conclude absque hoc that he was an Esquire, and he hath affirmed himself to be an Esquire by saying & prædictus, &c. but he ought to have alleged specially that Robert Boyle Knight, who was sued by the name of Robert Boyle Esquire: and 2 E 4. f. 3. is against the other books, and the law is otherwise. It is true that the old book of Entries, Title Trespass, and some other Presidents which passed sub silentio are against me, but the Law generally is against those Presidents, as Rastal entries brief 54. 19 H. 6. 2. 36, 44. which say, if he come in he is estopped, Br. Tit. Deff. 15 & 26. 32 H. 6. 3. 35 H. 6. and many other books, and the book of 19 H. 6. 43, which is objected on the other side is against them, and Dyer, f. 58. But though he were not estopped, yet we may take advantage of the first Original writ, for it is but abatable by the misnomer, and so not abated; and here is a flaw in the rejoynder, for he ought to have traversed that he was not an Esquire, which he hath not done. 2ly. The 26 of March is after the original sued forth, and so it is uncertain in respect of time, when he was a Knight, Plow. 27. by Morgan, 7 H. 7. 5. And the warrant of Attorney is good, though it be in Latine, and if it were in English it would be erroneous, for the entry is material, and the constant practice is not to enter the warrant before the issue, Trin. 8 Jac. Morley and Morley in this Court, and here is not the entry of the warrant it self, but the Entry is that he is Attorney by Warrant. Roll chief Justice, If one bring a writ of 1000 l. and it be abated, and then he bring another writ for the same debt, may he increase the damages accrued betwixt the first writ and the second? Certainly no, for the second writ is but the renewing of the first writ, and is not a new writ; But here are divers points considerable, therefore speak again to it, But a ne exeat regnum is usually sued forth in such cases as this, although that originally this writ was only used in businesses which concerned the State, and not in private cases; and the forbearance to sue it is a good consideration to ground an Action upon. At another day the Case was again put by Christ. Turner, Averment. Estoppel. Abated. Abatable. Traverse. Entry. Increase of damages. Prerogative Writ.

and he prayed the judgement might be reversed, and in his Argument he made these questions. 1. Whether there be a good consideration to raise a promise, and he held there is not, because it doth not appear that the Plaintif had any cause of Action, Nat. Brev. 85. A. a ne exeat regnum is at the suit of the King, and not at the suit of a common person; and whereas it is objected that the King may stay any one from going beyond Seas, I answer any that he cannot stay one for every cause, but for a cause which concerns the State; and if there were in our case a good cause to sue out this writ, the agreement betwixt the parties not to sue it out is not a good agreement, Hob. 154. Dyer 296. Every one may go out of the Kingdom at his pleasure. 2ly. Here is no averment that both the Originals were sued forth for one and the same cause, although that they agree literally, Hob. Rep. Foster and Jacksons case. 3ly Here is no good averment, because it cannot be thereby known for what cause the last Original was sued forth, Cook Inst. f. 20. 4ly. Though there be an averment, yet it is void by the parties own shewing, 45 E. 3. 2. 21 H. 7. 24. And our case differs from the case of 10 lib. Ass objected, for there the averment was the Defendants averment, but here it is the Plaintifs. Also the damages in the first Original, and the damages in the second Original do differ, which ought not to be; but they should agree, otherwise the Originals shall not be presumed to be both of them for one and the same cause, 6 Rep. Spencers case, 12 H. 7. 2. 3 H. 6. 9 And the party shall not be estopped here, to say that he was a Knight, and this misnomer is well pleaded, for there are but two ways to plead misnomer, and we have pleaded it one of those ways, Cooks Entries 689, 690. Tit. Outlawries, Rastal brief 608. Tit. Trespass 610, and the presidents of 1 E. 4. 3. and 21 H. 7. are with us, that he shall not be estopped, and he pleads not expressly that he was an Esquire, but only by way of implication. Serjeant Twisden on the other side prays for judgement, and he argued, 1. That here is a good consideration, for he is intitled to have this writ by Fitz. Nat. Brev. 85. where it is said any person may make a surmise to have this writ, for it conduces to the benefit of the Plaintif, and of the Defendant also, and the King may hinder any one from going beyond Sea, 9 Car. Meads case, 18 Iac. C. B. Hall and Wollers case cited by Hobart to be adjudged, 43 & 44 Eliz. Rippon and North. 2ly. The Replication is good notwithstanding the Objection against it that here is not an averment, that the second Original is for the same cause as the first was, for it is not necessary to make such an averment, because that this is a special particular Action, and not a general Action, yet here is an averment if it be necessary. Thirdly. Here is no variance though the dammages doe differ, for the wrong done is properly the cause of the Action, and not the dammages suffered by the wrong, and the encrease of time hath made the damages to encrease, and so to differ, 26 H. 8. f. 6. in a second deliberance, Hill. 8 Car. entred 5 Car. in this Court, this point was resolved in Theophilus Finch and Laws case; and the misnomer objected is not material, for he is estopped to plead it, because he appears gratis by the name of Esq; not upon the Sheriffs return, Dyer 192. he must be admitted to be the same person, and so is estopped to say the contrary, 19 H. 6. f. 65. the Book of 19 H. 6. f. 43. is not against me, for there the party came in upon the return of the Sheriff, and not voluntarily as he doth here. Also the warrant of Attorny entred in English doth no hurt notwithstanding the objection that all pleadings ought to have been in Latin at the time of the giving of the warrant. for a warrant of Attorny may be entred at any time, because there is no precise time directed for the entring of it, 11 E. 3. f. 1. 24 E. 3. f. 62. 15 H. 7. f. 14. 4 Ed. 4. f. 13. Stat. 32 H. 8. C. 3. a warrant of Attorny entred at any time pending the plea is good, & at the

Consideration.

Agreement.

Averment.

Estopple.

Misnomer pleaded.

Implication. Consideration.

Replication.

Averment.

Cause of Action.

Misnomer. Estoppel.

Apparance.

Entry.

the time of the entring of it by the late Statute it ought to be in English. Roll chief Justice mutata opinione said, he may encrease his dammages by his second Action, otherwise it would be unreasonable, for he hath been delayed twenty years by the Outlawry of the Defendant. And here is also a good consideration to ground the Action, viz. the forbearance to sue out this Writ of ne exeat regnum, for it is beneficial to the Defendant, and it is for the Kings honor to grant it, and the party by forbearing to sue it, is freed of trouble, by not being stayed in England to be sued here. And here is no need of an averment, for it appears that both the Originals were sued forth for one and the same cause. But the question is, touching the manner of the pleading, whether he be not estopped to say that he is a Knight, and not an Esquire, and I see no reason why he should be estopped to say so, notwithstanding his voluntary coming in to reverse the Outlawry, for he comes in to save himself from arresting, and the lying under an Outlawry, and it would be mischievous if he did it not, and take all the plea together, methinks it is good, and the entry in English is good, for it is to affirm a judgement, and being good both ways, we will take that which makes the judgement good. Yet let it be argued again. At another day the Case was put again, and argued by Sergeant Glyn that the judgement was not good, and first he admitted, that here is a good consideration to ground the Action upon. 2ly. He made question whether there be a good averment touching the going beyond Sea, and touching the sum, and he said, that the judgement given in the Common-pleas was for the reason that he came in to reverse the Outlawry by the name of Esquire, and this is by Estople: But I conceive it is no Estople, for Knight is part of his name, and so the Outlawry is not good, 26 H. 6. there is no Estople made by the word prædict. But if it be an Estople, yet the Plaintif relies not upon it in his plea, but upon other matter, and that for these reasons, 1. Because the course of pleading is generally so in reversing of Outlawries, as it is here, and so is the old book of Entries, although some Presidents run the other way, and in the Common-pleas it hath been adjudged good as it is here pleaded, and he may well aver, that he is not the same person. 2ly. Estoples are taken strictly against him that pleads them, and are not favoured in Law, and shall not be therfore taken by implication. Cooks lit. f. 252. B. but if there should be an Estople here, it must be by implication only, and there ought not to be an Estople against an Estople in the same Record, as it would also be here, for he may as well be estopped to say that he is a Knight, as to say that he is an Esquire. Next the Plaintifs conclusion is not good, for he relies not upon the Estople, and a good plea with an ill conclusion is not good, 18 H. 6. f. 33. 11 Rep. Rawlins case. Roll chief Justice, Makes he not the conclusion upon the Record? let it be read, upon the reading it he said, that he relies not on the conclusion and so the Estople is relyed upon. Sergeant Twisden, In our Sur-rebutter we rely upon the Estople, although we do it not in our rejoynder, and so it is good. Sergeant Glyn, But you do not conclude upon the Record, to wit, whether you shall be received against the Record, as you ought to do, 22 H. 6. f. 26. Roll chief Justice, It is in effect said so, though it be not in expresse words. Finch Henage on the other side argued in affirmance of the judgement, and said, the question is, whether his comming in by the name of Esquire to reverse the Outlawry shall not be an Estople to him to say afterwards that he was a Knight, and I conceive it is, because he that comes in gratis to reverse an Outlawry shall not plead Misnosmer, 6 E. 4. f. 9. he who comes in gratis is not prejudiced if he be not allowed this plea, but it is otherwise if he come in upon process to reverse it. 2ly. It is lesse mischievous to deny the plea of Misnosmer, than to allow it where it is not allowable, the pleading of the Misnosmer if it be not true may invegle

Increase of dammages.

Consideration

Averment.

Estople.

Pleading.

Implication.

Conclusion.

Estop'e.

M.snosmer.

the Court, 10 E. 4. 12. 12 E. 4. f. 6. 19 H. 6. f. 8. There are 4 kinds of
4 Misnosmer Misnosmer, to wit, misnosmer of the Christian name. 2ly. Of the Sirname. 3ly. Of addition of Profession. 4ly. Of addition of place, and in none of them shall misnosmer be pleaded where the party comes in gratis, Br. Misnosmer 48. & 3 E. 4. 5. 27 H. 8. f. 1, 15 H. 6. Statham pl. Error, Dyer 192. 21 E. 4. f. 8. Fitzh. tit. Misnosmer 8. 39 H. 6. 1 E. 4. and as the case
Estople. here is he is estopped to plead misnosmer by reversing of the Outlawry which is a matter of Record, and by it he hath confirmed his name to be so, 19 H. 6. f. 1. 7 Ed. 4. f. 1. Although he might plead Misnosmer if he came in by a Cepi, yet there he may also plead another way specially if he will, and it will be good also, 19 H. 6. f. 1. For hath he here relyed upon his Plea of Misnosmer, but upon the want of Proclamation, and he reversed the Outlawry by the name of Esquire, and yet now he will say that he was a Knight, which is unreasonable, 34 H. 6. Fitzh. Protest. 7. and this is an allegation contra factum suum proprium.
Original. Here is a second original, and that is a good Original within the Statute; and it appears, that this second Original is against the same party, and so he acknowledgeth by the Record, by which the Court may be ascertained, that he was the same person, and his Addition mis-named shall do no hurt. And the second Original is good as the Court hath agreed upon opening of the Case. Roll chief Iustice, he reverseth the Outlawry as an Esquire, and afterwards sayes he is a Knight. He may come in without
Outlawry. Proces to reverse the Outlawry, where his person or estate is endangered by it, 39 E. 3. in Debt, 38 E. 3. but he cannot plead Misnosmer, yet he may protest, that he is a Knight, and save himself in another suit which may be brought against him. If he have pleaded right you agree, that he is not estopped here, and it appears that he is the same person, and comes in gratis
Original. by this name, yet it is no estople. And the second Original is good, for it appears that he is the same person, and that by the Statute, notwithstanding the variance, and he may come in gratis without proces, and take advantage of the error. But argue again to the point, whether he may bring a second Original by the Statute. At another day it was argued again, but I could not hear, but 33 H. 6. f. 19. & 50. was cited, that there ought to
Mutual Estople. be a mutual Estople, viz. on the part of the Plaintif, and of the part of the Defendant. Roll chief Iustice, It appears to be one and the same party, and we must maintain Actions against the Statute of Limitations, because
Iudgement affirmed. by that Statute the benefit of the Law is taken away in part. Therefore let the Iudgement be affirmed.

Hill. 1655. Banc. sup.

To shew cause why execution not done. Memorandum the two Sherifs of London appeared in Court, in their proper persons upon a rule of Court to shew cause why they did not grant out execution upon a judgement given in their Court, or else to make a
Return of the Sheriff. sufficient return of a Certiorari directed to them, because they had made three insufficient returns. Upon this, their return now made was read, the effect
View of the Record. whereof was, that there is no such judgement as the Writ mentioneth to make out execution upon. Roll chief Iustice, This is a good return, as it now is, and if the return be false, you may take your remedy against them for making a false return. Upon this the Councel prayed that the party might have a Copy of the Iudgement out of the Sherifs Office. Roll chief Iustice, You may have a sight of the Record, and if they will not suffer you to have it, you may have your remedy against them. The rule was, that the party should have a Copy of the Record.

Pasc-

Paſch. 1655. Banc. ſup.

VPon a motion for a new Tryal grounded upon an Affidavit, Roll chief Iuſtice ſaid, That if there be a Tryal and a verdict given upon it, The ſame iſſue cannot be tryed again by the ſame Jury, although the Chancery do order ſuch a Tryal, but if there be a miſtryal the party muſt move the Court where the Action was commenced for a Venire de novo to ſummon a new Jury. Nota.

For a new Tryal. Tryal of an Iſſue. Order of Chancery. Venire de novo.

The Protector and Bruſter.

Paſc. 1655. Banc. ſup.

CArew upon a rule to ſhew cauſe why an attachment ſhould not iſſue forth againſt Commiſſioners of Sewers in Suffolk for ſetting a Fine upon one for not obeying their orders, after a Certiorari was delivered unto them to remove the orders made againſt the party in contempt of this Court, ſhewed for cauſe, that the Fine ſet was for diſobeying a new Order of theirs made againſt the party after the Certiorari was returned, and not for diſobeying the Orders removed by the Certiorari, and ſo it was no contempt to this Court. Roll chief Iuſtice, The Certiorari doth not remove the Commiſſion of Sewers, and therefore they may proceed upon the Commiſſion notwithſtanding the Certiorari. Therefore let no Attachment iſſue againſt them.

Cauſe why no Attachment. Certiorari.

Paſch. 1655. Banc. ſup.

THe Court was moved to quaſh a return of reſcous, the reſcouſer being in Court, Upon this exception, viz. that the Endictment ſets forth that the party reſcoued was arreſted on or about the fourth day of February, and ſayes not certainly when, and upon this it was quaſhed.

Return of a Writ of reſtitution.

Paſc. 1655. Banc. ſup.

THe Court was moved upon an Affidavit for an Attachment againſt four that were ſerved with a Subpæna out of this Court to appear as Witneſſes for the Protector at a Tryal upon an Endictment of Perjury, and did not appear, whereby the Tryal could not go on. The rule was, that an Attachment ſhould iſſue forth except cauſe ſhewed to the contrary. Nota.

For an Attachment. Granted, n'ſi.

Paſc. 1655. Banc ſup.

VPon evidence given in a Tryal at the Bar in a Treſpaſs and Ejectment betwixt Goodſon and Iones, It was ſaid, That one may not ſhew in evidence to a Jury an Inſpeximus of a Deed inrolled in Chancery, if it be not a deed of bargain & ſale enrolled there, for if it be a deed of feofment, the party muſt ſhew the Deed it ſelf, for the inſpeximus is no matter of Record. But by Roll chief Iuſtice, Though the inſpeximus be the inſpeximus of the Enrolment, and not of the Deed it ſelf, yet if it be an antient Deed it may be given in evidence... It was then alſo ſaid, that if it do not appear by the fabrick of a Deed that lands are to paſs thereby by way of feof-

Evidence to a Jury. Matter of Record. Feofment.

Uſe. ment yet the land may paſs by way of uſe, if there be a ſufficient conſideration expreſſed in the Déed to raiſe a uſe. It was alſo then ſaid, that if a Indenture. Déed do run thus, This Indenture made, whereas in truth the Déed is Deed Poll. not indented, yet may this Deed operate as a Deed Poll. It was likewiſe ſaid, that if one make a voluntary conveyance upon conſideration of Badge of fraud. natural affection, and is not at that time indebted unto any, nor be in treaty with any for the ſale of the lands, ſuch conveyance hath no badge of fraud, but otherwiſe it is if he be indebted or in treaty for ſale of the lands. Voluntary Affidavit. It was then alſo ſaid, that a voluntary Affidavit made before a Maſter of the Chancery cannot be given in evidence at a Tryal.

Paſch. 1655, Banc. ſup.

Treſpaſs and Ejectment. IN a Tryal at the Bar in a Caſe between Bryers and Lake in an Action of Treſpaſs for cutting down and carrying away wood, and the Defendant juſtifying as a Commoner for Eſtovers, It was ſaid, That if an antient New Cottage. Common by preſcription. Cottage which had Common be fallen down, and another Cottage is erected in the place where the old Cottage ſtood; this is no new Cottage, but it may claim common as an antient Cottage by preſcription. Nota.

Timbrell and Bullock.

Paſch. 1655.

Treſpaſs and Ejectment. Suſpenſion of rent. Rent revived. IN a Tryal at Bar in a Treſpaſs and Ejectment between Timbrell and Bullock it was ſaid, that to make a ſuſpenſion of rent reſerved upon a leaſe for years, the Leſſor muſt out the Leſſee of part of the thing let at leaſt, and hold him out till after the day on which the rent is made payable by the leaſe, and if the Leſſee re enters the rent is revived. It was alſo then ſaid by Roll chief Juſtice, That if one have a leaſe for years of land by Deed, and during the term the Leſſee accepts to hold the lands for a leſſer Surrender of Leaſe. term by parol, this is a ſurrender of the Leaſe by Deed. It was then alſo ſaid, if there be a leaſe for years rendring rent at a day, with a clauſe of re-entry for not payment; If the Leſſor do enter into part of the lands let before the day of payment, and at the day he makes a demand of the rent; Notwithſtanding this demand, and a non payment of the rent follows there- Avoidance of a Leaſe. upon, whereupon the Leſſor re-enters, yet ſhall not this re-entry make the Leaſe void, for the rent was ſuſpended at the time of the demand.

The Protector and the Town of Colcheſter.

Paſch. 1655. Banc. ſup.

Return of a Writ of reſtitution to a Recorders place. BErnardiſton being removed from his Recorders place of the Town of Colcheſter in Eſſex by the Bayliffs and Common Counſel of the ſaid Town, prayed for his writ of reſtitution to the Bailiffs and Common Counſel thereof to be reſtored, and hath it, and upon the return they ſet forth the cauſes why they removed him, and why he ought not to be reſtored, which were to this effect. Firſt, that he being Recorder of that Town, at a quarter Seſſions held there before him and others, one Goodall was endicted for having two wives, and convicted thereof, and prayed

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his Clergy, and was denied it by Bernardiston the Recorder, and was condemned to die, & was respited, & after at another Sessions held, there he was notwithstanding his former judgement admitted to his Clergy. 2. That he neglected to sit at the publique Sessions of the Peace, which ought to have been held for that Town, whereby the Sessions could not be held. 3. He made one Lis, his Deputy, who was not an utter Barrister, as he ought to be, and contracted with him for 40 l. a year to execute his place, 4ly. He neglected for a long time to sit in Court, whereby causes ready for tryal could not be tryed in delay of Justice. Latch of Councel for Bernardiston to the first exception answered, That though he had proceeded erroniously to deny the Clergy to Goodall, yet this being not done as he was Recorder, but as he was one amongst others of the Commissioners of Oyer & Terminer, which Commission was but to endure for a year, & was a distinct power from the Recorders power, & was executed by him together with other Commissioners, it was no cause to remove him. To these he answered, that there doth not appear by the return that any body received any prejudice by his not sitting in Court to hold the Sessions, nor that there was any cause to hold a Sessions, and the Sessions which they suppose was appointed to be held was an illegal appointment of them, for it appears not to be appointed by those that had authority to appoint, or to hold them, and so no fault appears in the Recorder for not holding them. 3ly. The Justices are mis named, for they are called the Justices of the Borough, whereas it should be the Justices of the King. 4ly. There doth not appear to be any appointment at all of any quarter Sessions, and so there can be no fault for not holding them; and it is not necessary (as it is suggested) for him to make an utter Barrister his Deputy, but saying he was not a fit person to be his Deputy is too general an accusation, for they ought to shew in what he was insufficient, neither doth his contracting with him for money to execute the place for him, any ways concern the corporation, nor is it malum in se, but is only punishable by the Statute of 5 Ed. 6. and as to the not tryng of the issues joyned in that Court, at the days they were to be tried upon, this is no cause to deprive him of his place, which is a freehold, for few Stewards of Corporations do otherwise than he hath done, for they usually stay till they have a competent number of causes to try before they will sit to try them, and there appears to be but 5 causes untryed, which is no great number, neither doth it appear that he had any notice that these five were ready for tryal, and so here cannot be so great an offence as is supposed, and he cited Semaigns case 9 Rep. 53. nor doth it appear that any tryal was disappointed by his absence, for it appears not that any issue was joyned in any of the causes, or any warning given for tryal during the time that is surmised for him to neglect to sit in Court; And besides, though these were sufficient crimes for to deprive him of his place, yet they have not proceeded against him in a legal way, for he was never called to answer the crimes objected against him, but is deprived without hearing his defence, which is illegal, as Sir James Baggs case is. Roll chief Justice, he ought to be heard what he could say for himself, else how could it be known whether there were just cause to remove him or no, and it is very hard to deprive one of his freehold without hearing him. At another day Serjeant Twisden moved the Court for their opinion, whether Bernardiston ought to be restored or no, and answered the exceptions formerly taken much to the effect as Latch had done. Whereupon Roll chief Justice said, you ought to have conversed him before you put him out, to hear what excuse he could make for his absence, otherwise how could you know whether he had just cause or not for his absence, Therefore let him be restored except cause be shewed to the contrary Saturday next. Postea.

Distinct power.

Prejudice.

Authority.

Misnomer.

Deputy Recorder.

General accusation.

Malum in se.

Freehold.

Notice.

Illegal proceeding.

Defence.

Restored, nisi, &c.

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Edwards and Stiff.

Paſch. 1655. Banc ſup.

Tryal in Treſpaſs and Ejectment. Jury ſuffered to drink at the Bar.

MEmorandum, Vpon a tryal at the Bar in a Treſpaſs and Ejectment between Edwards Plaintif, and Stiff Defendant, the evidence being long and the Weather hot, the Jury deſired they might have drink, which the Court granted, but ſaid they ſhould have it at the Bar, whereupon drink was ſent for for them, and they drunk it there before they went out to conſider of the evidence. Roll chief Juſtice did then reprove the Attorneys and Sollicitors for the great charges they uſed to put their Clyents to, in

Feaſting of Iuries.

feaſting the Jury, and ordered that thenceforth no more then 3 s. 4 d. ſhould be allowed to any Iuryman to pay for his dinner. Nota.

Paſch. 1655. Banc. ſup.

For a new tryal. Death of a Witneſs.

VPon an Affidavit read in Court, that a material witneſſe in the cauſe that was ſerved with a ſubpœna to give his teſtimony at the tryal, and dyed before the tryal: The Court was moved on the Defendants part for a new tryal, but the Plaintif oppoſed it, much inſiſting upon this, that there was no miſcarriage on his part: Whereupon Roll chief Iuſtice anſwered, here is the Act of God in the Caſe, which cannot be reſiſted, and this tryal is final to the Defendant, Therefore if the Plaintif will not conſent to

Act of God.

New tryal paying coſts.

take his coſts, and goe to a new tryal, we will not be haſty to give judgement, but will adviſe upon it.

The Protector and Gunter.

Paſch. 1655. Banc. ſup.

To quaſh two Endictments.

THe Court was moved to quaſh two Endictments for continuing of purpreſtures in the high way, and it was urged by the Counſel that there were 4 Endictments preferred againſt his Clyent, two for erecting the purpreſtures, and the other two for the continuing of them, and upon a tryal we were found not guilty of the erecting them, and therefore we cannot be guilty of the continuing of them, and he took this exception to the caption of the Endictments, viz. That it is ſaid that the Endictments were preferred at the Seſſions held at East-Grinſteed in the County of Suſſex, where it ought to have been at the Seſſions of the Peace held at East-Grinſteed for the County of Suſſex. Roll chief Iuſtice anſwered, You may be guilty for continuing of that which another did erect, and not you, but if the erecting and

Denied.

continuance be mentioned in one and the ſame Endictment you cannot be guilty. But plead to them, for no ſuch thing appears in the Record, but only that you kept the Highway ſtopped, but ſays not who ſtopped it.

Paſch. 1655. Banc. ſup.

To quaſh an Endictment.

THe Court was moved to quaſh an Endictment grounded upon the Statute of 5 Eliz. preferred againſt one for uſing the Trade of a Draper, not having ſerved as an Apprentiſe in that Trade, according to the Statute, upon theſe 2 Exceptions, 1. It is ſaid he uſed the Trade in the year 1653. and doth not ſay the year of our Lord. 2ly. It is not ſaid that the Jury

was

was returned, nor whence they were, and both exceptions were held good by Roll chief Iustice, and the Endictment was thereupon quashed. Quashed.

Pasch. 1655. Banc. sup.

THe Court was moved to quash an Endictment against one Peers, for speaking provoking language to one, contrary to the late Ordinance of the Lord Protector and his Councel, upon these Exceptions. 1. It is said the Endictment was at the Sessions held at A. and doth not say in what County. 2ly, It is said by an Ordinance of the Protector made such a day, and doth not say in that case provided. And upon these Exceptions it was quashed. To quash an Endictment upon the Ordinance against Duels. Quashed.

Pasch. 1655. Banc. sup.

THe Court was moved for a tales to a Northumberland Jury returnable this Term, because but 8 of the panel returned did appear. But Roll chief Iustice answered, Take it returnable in Michaelmas Term next, but this Term you cannot have it. For a tales. Return of a tales.

VValdron and VVard.

Pasch. 1654. Banc sup.

IN a tryal at the bar between Waldron Plaintif, and Ward Defendant, One Mr. Conye a Counceller at the Bar was examined upon his Oath to prove the death of Sir Thomas Conye. Whereupon Serjeant Maynard urged to have him examined on the other part, as a witness in some matters whereof he had been made privy as of Counsel in the cause. But Roll chief Iustice answered, He is not bound to make answer for things which may disclose the secrets of his Clyents cause, and thereupon he was forborn to be examined. Tryal at Bar. A Counceller at the Bar examined as a witnesse. Not to disclose a Clyents cause.

Pilkinton and Bagshaw.

Pesch. 1654. Banc. sup.

VPon a tryal to be had at the Bar between Pilkington and Bagshaw, the Plaintif would not put in his writ that the tryal might goe on; Whereupon Roll chief Iustice bid the Cryer to call the Attorney of the Plaintif to appear, and to bring in the writ upon pain of 20 l. and said, that if he brought it not in he should be put out of the Roll. Serjeant Maynard moved, that if he brought not in the writ that the Plaintif might be called non-suite upon the Record, which Roll chief Iustice answered might well be, because the parties have day in Court by the Record or Roll; afterwards the Solicitor for who had the writ brought it in; yet Roll chief Iustice said, There shall, notwithstanding the writ be brought in, be 20 l. fine set upon him for his trifling with the Court. Tryal at the Bar. Pain of 20 l. Attorney put out of the Roll. Non-suite upon the Record.

The Protector and Sumner.

Pasch. 1654. Banc. sup.

To bail a prisoner denied.

SErjeant Bernard moved that Sumner that appeared in Court upon his habeas corpus directed to the Keeper of Northampton Gaol might be bailed, for that having killed two men upon the Highway the Jury had found it Man-slaughter se defendendo. Roll chief Justice answered, The Juries conclusion is contrary to their premises. Therefore let the prisoner be sent to Northampton Gaol whence he came, yet that may not be, for the fact was done in Peterborough, and therefore he cannot be tryed at Northampton, therefore let him be sent to Peterborough Gaol with a writ ad recipiendum to the Gaoler there to take charge of him.

Tryal.

Writ ad recipiendum.

Pilkington versus Bagshaw.

Pasch. 1655. Banc. sup.

Trespass and Ejectment.

IN a Tryal at the Bar in a Trespass and Ejectment betwixt Pilkington and Bagshaw, the question being whether Copyhold lands may be entailed by the custom of the Manor, It was said that if Tenant in tail, and the issue in tail of Copyhold lands in tail joyn in a surrender in a Court Baron of the Copyhold lands, that this is not an estopel, for it ought to be by fine or deed indented. And Roll chief Justice said, that Copyhold lands in tail are not within the Statute of Westm. 2. but it is a Customary entail like in its nature to another entail, and such an estate must be docked by fine, or by some other customary way. It was also said by him, that if Copies of Court Rolls be shewed to prove a Customary estate, the enjoyment of such estates must also be proved, otherwise the proof is not good. It was also said upon the evidence, That a seisure by the Lord made of Copyhold entailed lands within the Manor of Wakefield in Yorkshire is in the nature of a recovery to dock the entail, and that the manner of doing it is either for the Copyholder to let his Copyhold for more years than he ought, or to refuse to do his service, and then the Lord seises the lands for a forfeiture, and grants it to another by the consent of the Copyholder that made the forfeiture. It was then also said by Roll chief Justice, that a Custom cannot be urged for a thing that hath its beginning since Rich. the 1. if a Record can be shewed to the contrary. It was also said by him that a common recovery supposeth a recompence in value to all persons who lost the estate by the recovery. He said also that he conceived that there could be no such Custom to cut off entails of Copyhold lands by the forfeiture and seisure of the Lord, for his seisure upon the forfeiture destroys the Copyhold estate by the Common Law, for it is in the Lords election after the seisure whether he will grant the estate again or no, and you do not prove that the Custom binds him to it. Nota.

Estopel.

Copyhold lands in tail.

Customary entail.

Fine.

State enjoyed.

Seisure of Copyhold lands.

Custom.

Common recovery.

Recompense in value.

Cust m.

Copyhold destroyed.

Harris

Harris and

Paſch. 1655. Banc. ſup.

To amend an old judgement. Denied.

THe Court was moved in the Caſe of one Harris, that the entry of a judgement twelve years paſt might be amended upon the Roll. But Roll chief Iuſtice anſwered, It cannot be after ſo long time paſt.

Paſch. 1655. Banc. ſup.

Day to inſpect an Infant. Entry upon the Roll.

VPon a writ of Error brought to reverſe a fine levied by an Infant being a Feme Covert. The Court was moved for a day to bring in the party that levied the fine to be inſpected by the Court, which was granted, and at the day ſhe was brought into the Court, and viewed, and two witneſſes deposed that ſhe was within age at the time of the fine levied, which was entred upon the Roll, upon which the Iſſue was tryed.

Paſch. 1655 Banc. ſup.

Election.

IT was ſaid by Roll chief Iuſtice, That if there be two Kinſmen in equal degree of kindred to the Inteſtate, it is in the election of the Ordinary to which of them he will grant Letters of Adminiſtration.

Paſch. 1655. Banc. ſup.

Outlawry reverſed.

AN Outlawry was reverſed, becauſe the place where the County Court was held is not ſhewed in the ſecundo exactus.

Paſch. 1655. Banc. ſup.

To affirm a judgement a writ of Error depending. Denied.

IT was moved that there was a judgement given in the Common Pleas, and thereupon the Defendant brought his writ of Error to reverſe the judgement in this Court, and ſince pending the writ of Error the parties were agréd, and therefore they deſired the judgement might be affirmed, becauſe that otherwiſe ſatisfaction of the judgement cannot be acknowledged upon the Roll, becauſe the Court of Common Pleas were foreclosed to do any thing further upon the judgement given there by reaſon of the writ of Error. But Roll chief Iuſtice anſwered, It cannot be, for you ſhew no cauſe why we ſhould affirm the judgement, and therefore we will make no rule in it, but enter ſatisfaction upon the Roll if you will at your own peril.

Paſch. 1655. Banc. ſup.

Action upon the Caſe for vexation.

IT was ſaid by Roll chief Iuſtice that an Action upon the caſe will lie againſt one that brings vexatious actions againſt another, or for entring of Actions of a great value, to force his adverſary to put in great bail, where he hath but ſmall cauſe of Action. Nota.

Trevanian and Penhollow.

Trin. 1655.

Plea to an Action on the Case.

TRevanian brought an Action upon the case against Penhollow for speaking of these words of him, Thou hast taken a false Oath at the Assizes, and art false forsworn. The Defendant pleads that the Plaintif had agreed to accept of 3 Juggs of Beer from him in satisfaction.

Demurrer.

The Plaintif demurred to the plea, and for cause shews that it doth not appear that the three

Judgement.

Juggs of Beer were paid or tendred by the Defendant; and upon this exception judgement was given for the Plaintif, &c.

MEmorandum, Trinity Term 1655. beginning the 15 of June being Friday Justice Ask late alone in the Court of the Upper Bench, being then the sole Iudge there, The late Lord chief Justice Roll having surrendred his Patent the Tuesday sevenight before, being the 5 of June, as I was informed.

MEmorandum, Afterwards the same day John Glyn his Highness the Lord Protectors Serjeant at Law took his place of Lord chief Iustice of England in this Court, and the Lord Lisle one of the Lords Commissioners of the great Seal of England made a Speech unto him, according to the Custom, and Serjeant Twisden moved for a tryal at the Bar the next Michaelmas Term, which was granted, nisi, &c.

The Protector and the Town of Colchester.

Pasch. and Trin. 1655. Banc. sup.

Exceptions to a return of a Mandamus to the Town of Colchester.

VPon a Mandamus to the Bailifs of Colchester to restore Bernardiston to the Recorders place of that Town, upon the return they certified the causes for removing him, and why he ought not to be restored. 1. That one Goodall being endicted upon the Statute for having two wives, and convicted thereof did pray his Clergy, and was refused it by Bernardiston, and was condemned to die, and after at another Sessions he admitted him to his Clergy, and so he was burnt in the hand. 2ly. That he neglected to sit at the Sessions, whereby the Sessions for the Town could not be held duly as they ought to have been. 3ly. That he appointed a Deputy Recorder to execute his place for him, who was not an utter Barrester, and contracted with him for 40 l. per annum. 4ly. That he neglected to hold Courts whereby causes could not be tried, to the prejudice of many. Latch of Councel with Bernardiston to the first cause answered, That although it was an Error in Judgement to deny the Clergy where it should have been granted; yet this was not committed as he was Recorder of the Town, but as a Commissioner of Oyer and Terminer, which was to endure but for a year, and was a distinct power from his power as he was Recorder, and executed by him, with other Commissioners that were joyned with him in Commission. To the second he answered, that here doth not appear to be any prejudice to any by his not holding the Sessions, nor that there was any cause to hold them, and besides, it doth appear, that the Sessions where he neglected to sit were not legally appointed to be held, for they were appointed by them that had no authority to do it, viz.

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by the Maior and Baylifs, whereas they ought to be appointed by the Maior, Baylifs, and Recorder; and next the Juſtices are miſ-named, for they are called the Juſtices of the Borough, whereas they ought to be called the Juſtices of the King. 4ly. There doth not appear any appointment at all of the Quarter Seſſions. To the 3d. he anſwered, that it is not neceſſary that he ſhould appoint a Barreſter to be Deputy-Recorder, and to ſay that he was not fit to be Deputy-Recorder is too general a charge, but it ought to be ſhewed in what he was unfit, and his contracting with him for money concerns not the Corporation, neither is it malum in ſe, but is only puniſhable by the Statute of 5 Ed. 6. And as to the laſt, viz. his neglecting to try the iſſues joyned at the dates appointed it is not a crime materiall to deprive him of his free-hold, and few Stewards do otherwaies, for they do uſually ſtay till they have a competent number of Cauſes to try, before they will ſit; and here are but ſix cauſes alleged to be untryed, and one of them was not tryable in that place, nor is it averred, that he had notice given him of any iſſues to be tryed, and ſo the offence is the leſs, 5 Rep. Semaignes caſe, nor doth it appear, that any tryal was diſappointed by his abſence, for it appears not that there was any iſſues joyned, or any warning given for tryal in any of the Cauſes during the time alleged, wherein it is ſaid he did forbear to ſit to try them. Laſtly, here is no juſt way of proceeding to deprive him of his place though he might be deprived, for he was never ſummoned to appear to anſwer the matters objected againſt him, as he ought to have been, and ſo is Cook in Sir James Baggs caſe. Sergeant Glyn on the ſame ſide inſiſted only upon the laſt matter urged by Latch, which he ſaid went through the whole Caſe. Roll chief Juſtice, He ought to have been heard, how elſe can it be known whether they had juſt cauſe to remove him or not, and it is very hard to deprive one of his free-hold without hearing him make his defence. The Court was moved at another day for their opinion, and then Sergeant Twiſden endeavoured to anſwer ſome exceptions taken to the return by Windham, and to make good the exceptions taken againſt Bernardiſton, much to the ſame effect as formerly. Whereupon Roll chief Juſtice anſwered, you ought to have convented him before you had put him out, that you might have heard what excuſe he could make for his abſence, elſe how can it be known, whether he had a juſt cauſe of abſence or not. Therefore let him be reſtored, niſi, &c. At another day, being in Trinity Term 1655. Sergeant Maynard ſhewed for cauſe why he ought not to be reſtored, 1. That he held not the Courts duly, but did abſent himſelf for ſixteen months, without any cauſe, to the endangering of the forfeiture of the Charter of the Town, and ſaid, that if an Officer of Record do wilfully and without cauſe abſent himſelf from his Office, it is a forfeiture thereof, for by ſo doing the Charter is forfeited, and here is no ſuppoſition of any excuſe. 2ly. The return is good, though no notice was given him, for he ought to take notice of himſelf as he is an Officer of that Court, and endict him they cannot, and if his offence be true de facto they may put him out of his place, as a Maſter may put away his Servant, and this their Charter warrants them to do Twiſden on the ſame ſide ſaid, he hath contracted with another for his place, and ſo is diſabled by the Statute. Wild, He could not be here convented, for it is expreſly ſaid, that he went to unknown places. Glyn chief Juſtice, The main buſineſs inſiſted on was his abſence, but here was no notice given to him, and you ought not to proceed againſt him, and never hear him, though the crime objected againſt him be true, for it may be he was ſick or had ſome other juſt excuſe for his abſence, and he ought alſo to be heard to all the other crimes objected againſt him. Therefore let him be reſtored, niſi, &c. to morrow. Judgement niſi.

Judgement niſi.

Forfeiture of an Office.

Judgement niſi.

Howard and Howard.

Trin. 1655. Banc. sup.

Peerage pleaded.

MY Lord Howard being taken by a Latitat out of this Court appeared upon the day of the return of the Writ in Court, and pleaded his privilege of Peerage, and demands in judgement of the Writ, and thereupon to be discharged. Powis of Councel against him moved, that he might put in special bayl.

Bayl. Demurrer.

Glyn chief Iustice, You ought to demur to his Plea, for he is now in Custodia, and therefore he need not put in bayl. Nota.

The Protector and Norrice.

Trin. 1655. Banc. sup.

To discharge a Prisoner upon the Act of Oblivion.

NOrrice being committed to prison for speaking words against the Parliament in the year 1650. was thereupon endicted, and was convicted and fined 100 l. and ordered to lye in prison untill he could find Sureties for his good behaviour; afterwards he was brought into Court by vertue of a Habeas Corpus, and his Councel moved on his behalf that he might be discharged, because he was pardoned by the Act of Oblivion. It was urged against this for the Protector, that he may be a person excepted out of the Act, and therefore ought not upon this surmise to be delivered.

Surmise.

Glyn chief Iustice, It doth not appear to us that he is not excepted, and therefore we cannot deliver him. Thereupon it was moved for the Prisoner for a Certiorari to remove the Record hither, whereby he stands convicted, that he might enter the suggestion upon it, that he is pardoned by the Act.

Certiorari. Entry.

Glyn chief Iustice, Take it.

Webberly and Sir John Lenthall.

Trin. 1655. Banc. sup.

Motion against Sir Iohn Lenthall for detaining a Prisoner discharged. Action mony. False imprisonment. Endictment.

THe Court was moved for Webberly against Sir Iohn Lenthall, that whereas he being a Prisoner in the Upper Bench prison for Debt, and having agreed with his Creditors was discharged by them, yet Sir Iohn Lenthall did keep him Prisoner till he should pay him Action mony. Glyn chief Iustice, You have two remedies against Sir Iohn Lenthall for this, for either you may bring your Action of false imprisonment against him, or you may endict him for extortion. Yet let Sir Iohn shew cause why he should not discharge him paying his fees.

Strowd and Keckwith.

Trin. 1655. Banc. sup.

Mich. 1653. rot. 119.

Audita querela.

STrowd brought an Audita querela against Keckwith. The Case was this, Strowd acknowledged a Iudgement 17 Car. for 2000 l. upon which Iudgement an Elegit was taken forth against Strowds lands in the County of B. and lands thereupon were found and extended, and delivered to the Co-

Conuſee, and the Elegit filed, and the lands enjoyed accordingly for ſix years, then the Conuſee dies and makes his wife Executrix, who takes out a Scire facias upon the Judgment for 2000 l. directed the Sheriff of the County of C. being another County, and upon two Nichils returned hath judgment and execution againſt Strowd for the ſame Debt, who thereupon brings his Audita querela. Wadham Windham held, that the Audita querela did lye, and cited 15 H 7. 7. & L Q. f. 40. and ſaid this was an illegal proceeding againſt Strowd, becauſe that after an Elegit executed no other execution lies, but where there hath been no execution of lands in the ſame County, or in another upon the firſt Elegit, but here is land found, and the Elegit filed, and the lands enjoyed, 18 E. 12. Fitzh. tit. Execution 240. Dyer 152. an Elegit may be prayed to divers Counties. Glyn chief Juſtice, The Caſe is adjudged in Hobards Reports, that one cannot have an Elegit after a former Elegit, if lands be thereby found, and the Elegit filed. Therefore ſhew cauſe why judgement ſhall not be given for the Plaintif,

Execution.

Elegit to divers Counties.

No Elegit after an Elegit, Judgement.

Price and Carr.

Hill. 1654. Banc. ſup.

PRice brought an Action upon the Caſe againſt Carr for ſpeaking theſe words of her, A pox upon you for a Welſh whore, for thou wenteſt into the Country and emptiedſt thy Cask of a Baſtard. After a verdict for the Plaintif it was moved in arreſt of Judgement, that the former words videlicet, the ſaying ſhe was a VVelſh Whore are not actionable, becauſe no Action lyes at the Common-law for calling a woman Whore, and the laſt words are uncertain words, and leſs actionable. The judgement was then ſtayed till the Plaintif ſhould move. Whereupon at another day the Plaintif moved for judgement, and a Caſe in 17 Iac. in this Court was cited, and 41 Eliz. VVheeler and Abigals caſe, and it was urged, that the words ſhall be interpreted according to common intention and underſtanding of the hearers, and ſhall be adjudged very ſcandalous. Wild on the other ſide ſaid, they are frivolous words and not to be regarded, for they do not ſay poſitively ſhe is a Whore, nor that ſhe had a Baſtard, but the words are of a very uncertain meaning, for it appears not when the words were ſpoken, or when ſhe went into the Country, nor is there any averment what is meant by the words. Glyn chief Juſtice, Now ſince the Act, the calling of a woman Whore, and ſaying ſhe had a Baſtard will bear an Action, and here are words certain enough to fix a particular Scandal upon the party, by application of the words, and they are made more than general words or words of heat and paſſion. for there is a general application of them, and a ſufficient averment, and for the time of ſpeaking them we will not preſume they were ſpoken four years ſince, which was before the late Statute made againſt Adultery. Therefore let the Plaintif have her Judgement.

Arreſt of Judgement in an Action on the Caſe for words.

Words actionable.

Judgement.

Davis and Matthews.

Paſch. 1655. Banc. ſup.

THe Caſe was this, There being a controverſie in the Prerogative Court between the Widow of one that died inteſtate, and one of the inteſtates next kindred, who ſhould have Letters of Adminiſtration of the Goods

Bond put in ſure in the Prerogative Court.

goods and Chattels of the Intestate, It was at length agreed betwixt the parties, that the widow should have Letters of administration, and that thereupon she should enter into Bond in the prerogative Office, to make an equal distribution of the goods and chattels of the intestate amongst his kindred, whereupon Letters of Administration were committed unto her; and she afterwards entred into bond accordingly, and for not performing the condition of the bond in making an equal distribution of the estate, the bond was put in suite in the prerogative Court, upon which a prohibition was prayed, and a rule thereupon made for the Defendant to shew cause why it should not be granted, and at the day it was offered for cause that there ought to be no prohibition, because where an administration is granted to one unto whom the Ordinary is not bound by the Statute to grant it, as it is in this case, there the Ordinary may take a bond of the party, with condition to make an equal distribution of the goods; but otherwise it is where Letters of administration are granted to one to whom by the Statute they ought to be granted, and one Sharp and Sympsons case 14 Iac. was cited, and Hob. 191. On the other side it was urged that the Ordinary hath no authority to take such a bond for the equal distribution of the goods, and the difference put on the other side was denied, and it was said, that when the Ordinary hath once committed the Letters of Administration to the party, his power is then determined, and he cannot grant Letters of Administration upon Condition. Glyn chief Iustice, The taking of the Bond is against the Statute, for the wife ought to be preferred before the next of the kin, notwithstanding the Statute, and so is the common practice, except there be a special cause for the contrary, as where the wife hath had a former provision made for her by her husband, &c. Therefore let there be a prohibition, nisi.

Prohibition.

Ordinary.

Power determined.

Administration upon condition.

Prohibition granted.

Trin. 1655. Banc. sup.

To discharge a Guardian.

Inspection.

THe Court was moved on the behalf of an Infant to discharge a Guardian assigned by the Court, with an intent to make Richard Somers Attorney of this Court Guardian in his room, and that the former inspection may be discharged, and that the infant may be now inspected again, because when the former inspection was, and the Guardian assigned, there was no action depending in Court against the Infant. Glyn chief Iustice, Let it be so for the cause you have alleged, and give notice of it to the former Guardian

Sherlock.

Trin. 1655. Banc. sup.

rot. 1320, or 1315.

Error by an Infant to reverse a fine.

Inspection.

ONe Sherelock a Widow of the Parish of Earth in Sussex, an Infant, brought writ of Error to reverse a fine levied by her of her lands whilst she was a Covert Baron, and the Court was moved that she might have a Guardian assigned her to prosecute for her, and that she might be inspected by the Court, and that the inspection might be recorded; and there was an Affidavit made by one in Court, that he knew the Infant who was there present, and the time of her birth and baptizing, and swore the times precisely; the Church book was also produced in Court, and proved by Oath;

Oath, wherein the time of her baptizing was entred, and that she was the same person upon which she had by her own election Attwood an Attorney of this Court assigned for her Guardian, and the Affidavits were ordered by the Court to be recorded, and the inspection to be entred, and a scire facias awarded against the heir. Guardian assigned. Entry.

The Protector and Crasord.

Trin. 1655. Banc. sup.

UPon a return of a Mandamus directed to the Master and Fellows of Gonvile and Cayus College in Cambridge, to restore one to an Ushers place of a Free-school in Cambridge, of which they are visiters. It was excepted against it, that they had not shewed that they had any authority to deprive the party of his place; And 2ly. It doth not appear that they gave him any notice of their proceedings against him, whereby he might prepare to defend himself. Serjeant Twisden made question whether a Mandamus did lie in this case, because a Schoolmasters place is a temporal Office, and an Action at the Law lies for the party to recover it, and therefore it seems a Mandamus, which is an extraordinary course ought not to be granted, and he cited 8 Ass. and Sir Iames Bags case, and Dyer 209. and said it is not like an Office without fee. Latch on the other side answered The Mandamus is allowed already, and the legality of it is not now to be disputed, and Sir Iames Bags case is not repugnant to this case; for this is a publique office, and not a private, and tends much to the publique good, and is like to the case of an Alderman, or Freeman of a Corporation, or a Fellow of a College. Glyn chief Iustice, A Mandamus to restore one to a Churchwardens place hath been adjudged good. It is true that for a private office a writ of restitution doth not lie, but if the publique be concerned in the office it doth lie; and though it be an office with a fee belonging to it, that makes no difference; for a Recorders place is an office with a fee, and yet a writ of restitution lies for it; But it appears here that the Schoolmaster hath much abused himself, and therefore we will advise. At another day this case was moved again, and then Glyn chief Iustice said, I doubt whether a Mandamus doth lie in this case, for it lies not for every taking away of a mans freehold, as in the cases of a Keeper of a Park, or a Stewardship of a Court Baron. Wild questioned to whom the Mandamus could be here directed, for he said that the Master and Fellows are no Corporation; and he cited Boremans case of the Middle Temple, who prayed a Mandamus to be restored to that society, where it was held that the Innes of Court are not Corporations, but only voluntary societies. Latch on the other side said that it was very proper to have a Mandamus in this case, for it is a publique office, and not a private, as a Keepers place of a Park, or a Stewards place of a Manor are; and a Steward of a Court Leet is a publique Officer: And this Court hath jurisdiction to reform all grievances of this nature, and to keep other jurisdictions in good order, that they do not intrench one upon another, there is no Visiter to whom the party may appeal, and it were very unreasonable to leave him without remedy, and Mandamusses have been granted for places of less consequence than this as in Pasch. 2 Car. a Mandamus was granted to restore one to the place of a Town Clark, which is a private office, and 19 Iac. a Mandamus was granted to restore one to a common Clarks place of a Mill, and 5 Car. and 18 Car. to restore the parties to Parish Clarks places. And if the place be publique this Court will not leave the party to seek his

A Mandamus to restore one to an Ushers place in a Free-school, and the return and exceptions to it. Authority. Notice. Action at Law. Extraordinary course. Office publique, private. Writ of restitution. Office with and without a Fee. Mandamus. Freehold, Corporation. Innes of Court voluntary societies. Iurisdiction.

remedy at Law, and Alderman Eſtwicks caſe is well known, who was reſtored to the place of a Common Councel man of London, and here the party hath an imployment for his life, though he have not a freehold in it, and there is a ſetled profit accruing to him, and ſo prayed he might be reſtored. Wild on the other ſide held, that a Mandamus lies not in this caſe, and ſaid, this caſe differs from the caſes put on the other ſide; for the Schoolmaſter, though he have a freehold, yet it is but durante beneplacito, and he is in truth no more than a ſervant, and in all the caſes put on the other ſide the publique is more concerned than in this caſe 12 H. 4. f. 47. A Schoolmaſter hath no freehold as Skreen there held, and it is not like the caſe of a Churchwarden, which is an Office that the common Law takes notice of, 12 H 7. and a Town Clark is a publique officer of the Town, and Boremans caſe is very like to this; and the office of a high Steward is a publique office, and ſo is a Steward of a Leet, and one may put away a ſervant retained for his life, and ſo may the Schoolmaſter here be diſcharged, and this Schol is a private School, and is not a Corporation as Weſtminſter Schol is. Glyn chief Juſtice, by the ſame rule that the Schoolmaſter ſhould be reſtored may ever Scholar claim to be reſtored, and I conceive the Viſitors may remove the Maſter of the School, if he obſerve not the rules for government of the School, and it ſeems as reaſonable for them to turn out the Maſters, as to receive them into the place. But let the whole matter be referred to the Juſtices of the Aſſize, one of whom, viz. my Lord chief Juſtice St. John, is the Chancellor of the Univerſity of Cambridge, where the School is.

Imployment for life.

Durante beneplacito.

Churchwarden.

Reference

Fowke and Preſcott.

Trin. 1655. Banc. ſup:

Arreſt of judgement in an action upon the caſe upon a promiſe.

FOwke brought an Action upon the caſe upon a promiſe againſt Preſcott. The Caſe was this, Preſcott being a Coachman did by careleſs driving of his Coach break a pipe of wine of Fowkes which lay in the ſtreet, whereby much of the wine ran out, and was loſt: Fowke apprehends the Coachman, who thereupon promiſeth that if he would forbear to ſue him for the wine, that he would pay him as much as he had damnified him, and for breach of this promiſe he brings his Action, and obtains a verdict againſt the Defendant. It was moved in Arreſt of judgement, 1. That the Plaintiff had not averred how much the wine was worth that was ſpilt, and ſo he could not tell what ſatisfaction to make the Plaintiff for it, for he knows not the value. 2ly. Here doth not appear to be any requeſt made for the ſatisfaction by the Plaintiff. Serjeant Twiſden anſwered, Here doth appear to be an apparent damage, and he hath not ſatisfied the damage we have laid in our Declaration, nor hath the Defendant pleaded any tender of damages at all, and the Jury have found the damages. 2ly. We ſay that we have forborn to ſue him, and this implies no ſatisfaction made at the time of the Action brought. Alleyne on the other ſide, The Plaintifs Declaration doth not intitle him to the Action, and the finding of the Jury cannot make this good. Glyn chief Juſtice, Both parties did ſee the wine, and the Defendant is bound to take notice of the damage, and the Plaintif is not bound to give him notice, and the Jury hath made it certain, Therefore let the Plaintif have his judgement.

Averment.

Requeſt.

Tender of damages.

Implication.

Notice.

Judgement.

Dod

Dod and Herbert.

Trin. 1655. Banc. sup.

DOd brought an Action of Debt upon an Obligation to stand to an award, against Herbert, the Defendant pleaded nil debet, and upon a Demurrer these exceptions were taken to the Award, why it should not be good: 1. That here is 100 l. awarded to be paid to the party, and it doth not appear that it is to be paid unto him in satisfaction of the wrong done unto him. 2ly. Here is 8 l. ordered to be paid for charges and expences, which thing is not submitted unto by the parties, and so no Award ought to be made for them. 3ly. The Action here is meerly grounded upon the Award, and therefore the award ought to have been brought into Court, which is not done for ought appears here. Wild on the other side answered, that upon the penning of the whole Award, it appears that the 100 l. is to be payd for the wrong done to the party by the speaking of the scandalous words, and the Award is set forth to be made de et super præmissis, which makes it good, as my Lord chief Justice Rolls opinion was upon the first opening of the Record, and so was Burbidges case 16 Car. And as to the second Exception he held, that the 8 l. awarded to be payed for charges was within the submission, for the Arbitators have power to allow charges: And as to the last Exception, he said it is not necessary to produce the Award in Court. Glyn chief Justice, It is to be intended that the 100 l. is to be paid for the wrong done, and the 8 l for costs is as well within the submission as the other, and the Award is recited, and it is said to be made de et super præmissis. The only question is, whether the Award ought to be produced in Court, and I conceive it is not necessary to do it, although he must plead the Award in writing, for the Action is not brought upon the Award, but upon the submission, for the Award is but the inducement, and the Court hath nothing to do with the Award, but to see whether it be in writing or no; For a Deed, that must I confess, be produced in Court, that the Court may judge whether it bind the party or not, and you your selves have here set forth the Award in your pleading, But speak to it at another day, at which time the case being only put, Glyn chief Justice said, if an Action of debt be brought upon an Obligation, the Obligation ought to be produced, and in all other cases where things cannot be demanded but by Deed; otherwise is it, if they may be demanded either by Deed, or without Deed; but here is no Deed in the case, for an Arbitrement under seal is no Deed, & the arbitrement may be made without a Deed, & therefore it is not necessary to be produced in Court, for it is but a writing under hand and seal. Iudicium nisi pro quereute.

Demurrer in debt upon an Obligation to stand to an Award.
Satisfaction.
Charges.
Submission.
In Curia prolata.
De & super præmissis.
Intendment.
Submission.
Inducement.
Where a thing must be produced.
Deed.
Arbitrement.
Writing.
Iudgement nisi.

Maynell and Mackaliye.

Trin. 1655. Banc. sup.

MAynell brought an Action upon the Case against Mackallye, and declared, That whereas he had an intent to enter an Action against the Defendant, and to arrest him at such a time, the Defendant in consideration that the Plaintif would forbear to arrest him at that time did promise that he would put in bail to him at any time after when he shall enter his action against him, and for breach of this promise he brings his Action. Upon non assumpsit pleaded, and a verdict for the Plaintif, it was moved in Ar-

Arrest of judgment in an Action upon the case upon a promise.

rest of judgement, That it is not said how long the Plaintif should forbear to arrest the Defendant, and it may be for so little time that it will not be a good consideration to ground the promise. But it was answered, that it is well enough, for the declaration pursues the words of the agreement between the parties, and cannot be better expressed. Glyn chief Iustice, It is a good consideration, and we must make reasonable construction of words, Therefore let the Plaintif have his judgement.

Consideration. Declaration. Reasonable construction. Judgement.

Abbott and Vaughan.

Trin. 1655. Banc. sup.

Pasch. 1655. rot. 557.

ABbott brought an Action upon the case against Vaughan and his wife, for words spoken of the Plaintif by the Defendants wife, and upon not guilty pleaded, and a verdict found for the Plaintif, and a judgement thereupon given, upon a writ of Error brought this Exception was taken, that the verdict found the wife only guilty, and yet the judgement was given against Baron and Feme, which was urged to be Error, but 9 E. 4. was cited on the other side, that the judgement is well given. Glyn chief Iustice, The Jury have found the wife guilty, and so the Declaration is true, and therefore just cause of Action, and the judgement well given.

Error upon a judgement in an Action upon the case for words.

Williams and Probe.

Trin. 1655. Banc. sup.

VVIlliams brought an Action upon the case for speaking these words of her, viz. Thou art a Whore, and I will prove thee a Whore, and thou hast made my house a Bawdy house. After a verdict it was moved in Arrest of judgement that the words are not actionable, because they do not imply that she had played the whore her self, though she had made the Plaintifs house a Bawdy house. But Glyn chief Iustice answered, If we take all the words together as they are laid they are actionable, for they are particular applicable words, relating to the parties playing the whore; Therefore let her have her judgement.

Arrest of judgement in an Action for words.

Particular applicable words. Iudgement.

Bacon and Ramsey.

Trin. 1655. Banc. sup.

THe Court was moved for Bacon a Barrester of Grays Inne that he might have his privilege to lay an Action transitory in Middlesex, whereas it was laid in Northumberland, and Franklin and Sir William Butlers case, and Bere and Iones his case of the Middle Temple were cited to prove that a Barrester ought to have this privilege, that where any transitory Action is brought against him, he may have it laid in Middlesex, wheresoever the cause of Action was. The Court advised, and desired to see the presidents cited, At another day it was moved again, and upon the presidents produced, It was ordered to lay the venue in Middlesex accordingly.

For a Barrester for his privilege to lay his Action in Middlesex.

Granted.

The

The Protector and Blackwell.

Trin. 1655. Banc. sup.

THe Court was moved for a melius inquirendum to be directed to the Coroner of Middlesex to enquire of what goods one Tooms that hanged himself did die possessed of, because the Inquisition returned did only find the goods he was possessed of in London. Glyn chief Iustice, You may have a melius inquirendum, it being for the Protector, if the practice of the Court will allow it, but it must be directed to the Sherif, because the Coroner hath done his office already, and hath nothing now to do with it. For a melius inquirendum. Sherif. Coroner.

Eston and Manley.

Trin. 1655. Banc. sup.

IT was moved in Arrest of judgement in an Action of Debt upon an Obligation, that the Obligation upon which the Action was brought was for the payment of 100 l. and the Plaintif declares for 80 l and so the Declaration varies from the bond. 2ly. It is said that the Action was entred in the same Counter, whereas there was no mention of any Counter before, neither doth it appear that the Counter is a Court. Glyn chief Iustice answered, the first exception is to no purpose, and for the second it is but an exception to a surplusage, which might have been left out of the Declaration, and it is also after a Verdict, Therefore let the Plaintif have his judgement. Arrest of judgement in debt upon an Obligation. Surplusage. Iudgement.

Thomas and

Mich. 1655. Banc. sup.

THe case was this, one promised to the Father, that in consideration that he would surrender a Copyhold to the Defendant, that the Defendant would give unto his two daughters 20 l. a piece, and after a Verdict in an Action upon the case brought by one of his daughters for breach of this promise, It was moved in Arrest of judgement, that the Plaintif had declared upon a joynt promise made which concerned another with the Plaintif, and yet the Action is brought but by one of them, whereas they ought to have joyned in the Action. But Glyn chief Iustice answered, that the parties have distinct interests, and so any one of them may bring an Action. Turner replyed, The Declaration mentions the promise to be a joynt promise. Glyn chief Iustice, But the Law doth distinguish the interest, though the Declaration be general. Serjeant Bernard, Here ought to be a several Action, and so hath it been lately adjudged in the Common pleas: But it was answered, that the Action is brought but for one twenty pound due to one of the Daughters, and so judgement for the Plaintif, nisi, &c. Arrest of judgement in an Action upon a promise. Joynt promise. Distinct interests. Distinction of Law. Iudgement.

VVood and Gunston.

Mich. 1655. Banc. sup.

No Action for scandalous words.

IN a Tryal at Bar in an Action upon the case for words between Wood Plaintif, and Gunston Defendant, It was said by Glyn chief Justice, That if a Counceller speak scandalous words against one in defending his Clyents cause, an Action doth not lie against him for so doing, for it is his duty to speak for his Clyent, and it shall be intended to be spoken according to his Clyents instructions.

Hether and Bowman.

Mich. 1655. Banc. sup.

Instrument in Law. Copyholder. Admission.

IN a tryal at Bar between Hether and Bowman in Trespass and Ejectment it was said by the Court, That the Lord of a Copyhold is but an Instrument to admit the Copyholder, and ought to admit him according to the surrender, or otherwise the admittance is not good.

Thurle and Madison.

Mich. 1655. Banc. sup.

Enrolment of a Deed.

Evidence.

Consideration.

IN a Tryal at the Bar between Thurle and Madison, It was said by Glyn chief Justice, that if divers persons do seal a Deed, and but one of them acknowledge the Deed, and the Deed is thereupon enrolled, this is a good enrollment within the Statute, and may be given in evidence as a Deed enrolled, at a Tryal. It was then also said, that if a deed express a consideration of money upon the purchase made by the Deed, yet this is no proof upon a tryal, that the monies expressed were paid, but it must be proved by witnesses.

Copy proved.

MEmorandum, That upon the same Tryal an Act of Parliament pronounced in point for the selling of Delinquents estates, was sworn to have been examined by the Parliament Roll, and that it was a true Copy before it was read in evidence. Nota.

VVood and Gunston.

Mich. 1655.

Memorandum.

New tryal for miscarriage of the Jury.

VPon a motion for a new tryal between Wood and Gunston, upon a supposition of excessive damages given by the Jury in an Action upon the case tryed at the Bar for words, viz. Calling the Plaintif Traytor, &c. 1500 l. being the damages given, It was said by Glyn chief Justice, that if the Court do believe that the Jury gave their verdict against their direction given unto them, the Court may grant a new Tryal. And a new Tryal was granted in this Case after a full debate had by Councell on both sides.

Cul-

Culliar and Iermin.

Mich. 1655. Banc. sup.

Culliar brought an Action upon the Case upon a promise, and declared, that the Testator of the Defendant in consideration, that the Plaintif would marry such a Woman did promise that he would leave him half his Estate at his death, and thereupon he did marry the party, and yet he did not leave him half his estate at his death. Upon a verdict found for the Plaintif, it was moved in arrest of judgement, that the Declaration was not good, for whereas the promise was, that the Defendant should leave him half of all his estate, which might be intended both of his real and also of his personal Estate, and of any estate in reversion, as well as of an estate in possession, the Plaintif only says, that the Testator died worth 3000 l. in possession, and that he did not leave him half of that estate, and it may be he left him part of his real estate, or estate in reversion to the full value of half his whole estate. But Glyn chief Iustice disallowed the exception, and gave judgement for the Plaintif. Arrest of judgement upon a promise. Judgement.

Lance and Blackmore.

Mich. 1655. Banc. sup.

Hill. 1654. rot. 191.

Lance an Executor brought an Action upon the Case against Blackmore, and declared, that in consideration that the Testator would suffer the Defendant to enjoy such a Close of land, the Defendant did assume and promise to pay 53 s. a year for the rent thereof for so long time as he should enjoy it, and for so much rent due for it for so long time in the Testators life time, and for so much rent due since his death he brings the Action. Upon non assumpsit pleaded, a verdict was found for the Plaintif; and entire dammages given. It was moved in arrest of Judgement, 1. That an Action of the Case doth not lie, it being for the non-payment of rent, which follows the nature of the land, and doth sound in the realty, for which a personal Action lies not. 2ly. Here doth not appear by the Declaration, to be any consideration to ground the promise upon, for the Declaration is that if the Testator in her life time would permit the Defendant to enjoy the Close, then, &c. and it is not averred, that the Testator did in her life time suffer the Defendant to enjoy the Close. Glyn chief Iustice, If a promise be made to the Testator, the Executor may have an Action, and it is a good consideration as to him, for the executor is representative of the Testator. And 2ly. An Action upon the Case will not lie for rent upon a promise in law, but upon a special promise of the party to pay it, as our Case is it will lie. Arrest of judgement in an Action upon the Case upon a promise. Personal estate. Consideration. Averment. Executor. Promise in Law, Special.

Ingram and Fawset.

Mich. 1655. Banc. sup.

In this Case it was said by Glyn chief Iustice, That if an Administrator bring an Action against an Administrator, it is not necessary for the Plaintif Administrator must shew how Administrator.

tif to ſhew by whom the letters of Adminiſtration were granted unto the Defendant, but he muſt ſhew by whom the letters of Adminiſtration were granted to himſelf to entitle himſelf to the Action, for if it appear not to the Court that he is Adminiſtrator, he cannot ſue by that name.

Mich. 1655. Banc. ſup.

How far ſpecial bayl is lyable for the principal.

IT was ſaid by Wild, and agreed by Whitwick one of the Maſters of the Upper Bench-office, that if an Attorny do appear for one in the Upper Bench, & ſpecial bayl is entred for his Client, to that Action, that that Bayl is not bound to ſtand Bayl to all other Actions that ſhall be declared in againſt the party upon the by, but the Attorny for him is bound to appear for him in all ſuch Actions, and to put in Common bayl.

Wagſtaff and Tempeſt.

Mich 1655. Banc. ſup.

Diſpenſation with a forfeiture of an Eſtate tayl.

IT was ſaid by Glyn chief Iuſtice upon evidence given in a Tryal at the Bar, between VVagſtaff and Tempeſt, that if tenant for life do levy a Fine of the Lands he is ſeiſed of, whereby he ſhould forfeit his eſtate, yet if he in the remainder will joyn with the Tenant for life in declaring the uſes, this is a diſpenſation with the forfeiture.

and LeGay

Mich. 1655. Banc. ſup.

For a time to accompt before Auditors.

THe Court was enformed, that in an Action of Accompt brought there was a verdict, that the Defendant ſhould accompt before Auditors, and that Auditors were aſsigned, and the parties were now before the Auditors, and thereupon it was moved on the Defendants part, that this Court would grant him time to accompt, for the reaſons alleged. But Wild anſwered, that it was not proper to move here, for the Auditors are now Judges of the matter, and may give time if they ſee cauſe. To which Glyn chief Iuſtice agreed, and ſaid, the Auditors are Judges by the Statute, and therefore move before them, and trouble not us with it.

Auditors Iudges by the Statute.

Sergeant Bradſhaw and Procter.

Mich. 1655. Banc. ſup.

Challenge to an array no part of the Record.

IN the Caſe of Sergeant Bradſhaw and Mr. Procter of Grays-Inne. It was ſaid, that a challenge to the array is no part of the Record, but ought to be determined whether it be good or not by the Judge, before whom the tryal of the Cauſe ſhould have been, if the challenge had not been taken; and ſo hath it been ruled upon ſerious adviſe in the Common-pleas: and it was then likewiſe ſaid, if there be a demurrer to a challenge at the Aſsiſes, the Judge of Aſsiſe may determine it there, or over-rule it, or adjourn it to be heard at another time.

By whom to be determined

Demurrer to a challenge.

Somes

Somes and Sir John Lenthall.

Mich. 1655. Banc. sup.

THe Court was enformed that an Action of Debt was formerly brought against Sir Iohn Lenthall, and that there was Judgement, and an execution thereupon taken out against him, but that he absconded himself, that he could not be taken, and therefore it was prayed in regard he was an Officer of this Court that the Court would order him to appear here, that he may be committed in execution to the Sheriff of Middlesex. But Glyn chief Iustice answered, if Sir Iohn Lenthall do appear here, and you pray him in execution, we can commit him to no other prison but the Marshalsea, for that is the prison of this Court, and to commit him to that prison of which he is the Keeper, without securing the Prisoners there, before we do it, will be an escape in Law of all the Prisoners. Therefore let Sir John shew cause why he should not pay the Debt, for it is neither for his own credit, nor the honor of this Court, that he should not satisfie his Debts.

For Sir Iohn Lenthall the Mareschall to appear, that he might be in execution.

Hardres and Prowd.

Mich. 1655. Banc. sup.

HArdres brought an Action upon the Case against Prowd, and declared, that whereas he at the instance and request of the Defendant had taken pains to reconcile differences betwixt the Defendant and I.S. and others, the Defendant did assume and promise unto the Plaintif to pay unto him 100 l. at a certain day, and for not paying the mony accordingly he brings his Action. And upon non-assumpsit pleaded, and a verdict found for the Plaintif. The Defendant moved in arrest of Judgement, 1. That here is no consideration set forth in the Declaration to ground the promise upon, for it is only said, that in consideration that the Plaintif had taken pains, &c. he did promise, &c. and this is a consideration executed, and not sufficient to ground a promise upon, and one Hunt and Diers case was cited for proof. 2ly. He doth not shew what pains he hath taken, and so it cannot be known whether his pains were sufficient to ground the promise upon. 3ly. He sayes, that he took pains to reconcile differences betwixt the Defendant, and I. S. and others, and doth not shew who these others were. The two last exceptions were over-ruled without speaking to; and to the first Wild answered, that here was a continuing consideration, though the pains taken were past, for it is said he took the pains at the instance and request of the Plaintif. Glyn chief Iustice, It is as you say, for here is more than a voluntary Curtesie, upon which no consideration for a promise can be grounded, for the pains here were undertaken at the instance of the Plaintif. Iudicium, nisi, &c.

Arrest of judgement in an action upon the Case upon a promise.

Consideration executed.

Continuing consideration.

Voluntary curtesie.

Mich. 1655. Banc. sup.

BY Glyn chief Iustice, If one come in upon the Exigent he may appear by his Attorny, but if he come in upon the Outlawry he must appear in his proper person, and not by his Attorny, and so is the constant practice of the Common-pleas, and of this Court also. Nota.

Where one may appear by Attorney, where not.

London and VVilcocks.

Mich. 1655. Banc sup.

Arrest of judgement in Tresp.

LOndon brought an Action of Tresp. against VVilcocks inter alia, for taking and carrying away 40 loads of Corn in the Straw. Upon a verdict found for the Plaintif, it was moved in arrest of Judgement that the Declaration was uncertain, for the Plaintif had declared for 40 loads of Corn in the Straw, and it doth not appear, whether they be Horse-loads or Cart-loads, or what other loads of Corn they are. But Glyn chief Justice answered, that it is well enough expressed, for it being of Corn in the Straw, it shall be intended Cart-loads, and therefore let the Plaintif have his Judgement.

Judgement.

Q. If the Action had been laid in the County of Cornwell where it is usual to carry Corn in the Straw upon Horses whether the Declaration would have been good.

VVood and Gunston.

Mich. 1655. Banc. sup.

For a new tryal in an action of Tresp. for words.

VVOod brought an Action upon the Case against Gunston for speaking of scandalous words of him; and amongst other words for calling him Traytor, and obteyns a verdict against him at the Bar, wherein the Jury gave 1500 l. dammages. Upon the supposition that the dammages were excessive, and that the Jury did favour the Plaintif, the Defendant moved for a new tryal. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the Jury ought not to be questioned, nor is there any Presidents for it in our Books of the Law, and it would be of dangerous consequence if it should be suffered, and the greatness of the dammages given can be no cause for a new tryal, but if it were, the dammages are not here excessive, if the words spoken be well considered, for they tend to take away the Plaintifs estate, and his life. VVindham on the other side pressed for a new tryal, and said it was a packed business, else there could not have been so great dammages, and the Court hath power in extraordinary cases, such as this is, to grant a new tryal. Glyn chief Justice, It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our Books for the Court to take notice of miscariages of Juries, and to grant new tryals upon them, and it is for the peoples benefit that it should be so for a Jury may sometimes by indirect dealings be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended of the Court; wherefore let there be a new tryal the next Term, and the Defendant shall pay full Costs, and judgement to be upon this Verdict to stand for security to pay what shall be recovered upon the next verdict.

Discretion of the Court.

Discretion Judicial, Arbitrary.

The Court not to be intended partial.

Granted.

The

The Protector and Buckner.

Mich. 1655. Banc. sup.

BUckner was endicted upon the Statute of 1 Iac. made against Stabbing at the Justice-Hall in the Old baily for killing of Horwood, and upon the evidence given for the Protector, the Jury found a special verdict, which was to this effect, viz. that Horwood and another man with him came into the lodging of Buckner being in Drury-lane, and when they were come into the lodging, that other man took down a sword in the Scabbard which hung there, and stood at the Door of the Chamber with this Sword undrawn in his hand, and kept the Door to keep Buckner from going out till they might bring a Bailif to arrest Buckner for a debt which he owed Horwood, whereupon upon some discourse between Buckner and Horwood, Buckner takes a Dagger out of his pocket, and stabs Horwood and kills him, and whether this was within the Statute of Stabbing was doubted by the Jury. Upon which Buckner was committed to Newgate, and after the Body and the Cause was removed into this Court by a Habeas Corpus and a Certiorari, and argued divers times at the Bar and at last on the Bench; and first Arthur Harris of Lincolns-Inn opened the Record, and only put the question, and then on the behalf of the Prisoner it was moved, that he might have a Copy of the Record, and Councel assigned him such as he desired, which the Court granted, then it was prayed he might be bayled, but that the Court would not grant, but turned him over to the Marescall, and gave day for the Protectors councel to be heard; At which day Twisden for the Protector made this question, whether Buckner was to have his Clergy in this case, or were debarred by the Statute or not, and he said, this question should not have been made by the Jury as they have done upon the special Verdict, but the Court ought to have made it, for the Jury are only to proceed upon matter of fact, and not upon matter in Law, and he argued, that he ought not to have his Clergy, for the Statute of 1 Iac. doth not create the offence, but leaves it to the Common-law, and only takes away the Clergy from the party that commits it; and to prove this, 1. It is not within the words of the Statute, and 2ly. it is not within the meaning of the Statute, neither in its preamble, nor in the body, or in the proviso thereof, for Buckner was not first strook, nor had he a weapon drawn against him, although he was kept a prisoner in his Chamber, which was not a considerable but a slight provocation of him to move him to so foul a fact. And within the body of the Act, there are no Acts expressed, but having a weapon drawn against him, or being first strucken, and this enumeration of the Acts excludes all other, as it is in the Statute of Fines, and in the Statute which takes away Clergy. Also the reason of Law requires to allow the Clergy to one that is first stricken: but here is no such reason, and the party might have had his remedy against Horwood for comming into his Chamber and imprisoning of him by an Action of Trespass; And the having a weapon drawn was a reason for the other to defend himself. Finch Henage for the Prisoner argued, that the Prisoner was only guilty of felony at the Common-law and is not within the Statute by which his Clergy should to be taken away. For first the Statute is to be liberally interpreted, because it is made in restraint of the Common-law, and it was made only to prevent fewds betwixt the English and the Scotish-Nation, which were then apt to break forth, and the quarrel here was not a drunken and sudden quarrel, but acted upon deliberation, and here is an Assault so great used

Special verdict upon an endictment upon the Statute of 1 Iac. against stabbing.

Interpretation.

againſt the priſoner, that it amounts to a ſtriking of him, 43 E. 3. f. 41. 42 E. 3. f. 7. and the impriſonment of him is more than an aſſault, and here is found a forcible entry into his Chamber, and the ſending for a Bailiff, and the ſtanding at his Chamber door with a ſword in the parties hand, though not drawn, which is as much in effect as if it had been drawn, and 23 Car. the Clergy was allowed to two perſons that aided and aſſiſted a third perſon in ſtabbing of a fourth man, and that becauſe the Clergy ſhall not be taken away by intendments. Glyn chief Juſtice, The Statute hath not been ſo favourably conſtrued as hath been argued, for here is no ſtroak, nor weapon drawn for his preſent defence, as the Statute intends; and ſtabbing with a Tobacco pipe, and with a Halberd hath been adjudged to be ſtabbing within the Statute, and the Statute doth not ſay being firſt aſſaulted, as this caſe is, but firſt ſtricken, and I conceive not that there are any words in the Statute that will keep you out of it. Day was given over to the next Term. At which day the ſpecial verdict was again repeated by Serjeant Maynard, and by him it was argued for the priſoner, that he was not within the Statute of 1 Iac. of ſtabbing, becauſe firſt here was an unlawfull impriſoning of Buckner in his own Chamber, and this could not be without an aſſault, next this Statute is not to be literally interpreted; for if there be Acts of terror uſed againſt one, although a weapon be not drawn, yet he is not within the Statute although he kill another, for the taking up of a Candleſtick to ſtrike another hath been adjudged a weapon drawn, and he cited Patye and Horwoods caſe, and all the perſons that came into his Chamber were Treſpaſſors, and one of them taking the ſword in his hand how could it be known what miſchief might have been done with it, Cooks caſe 14 Caroli, One may do a lawfull act by unlawfull means, and although Buckner did ill yet is he not within the Statute. Arthur Harris on the other ſide argued that the act was ſtabbing within the Statute, and ouſted the priſoner of his Clergy, and that he is within the meaning and words of the Statute. The Statute intended to prevent the killing of men ſuddenly, which is the worſt of all other killing, for it is as it were to deſtroy not only the body, but even to kill body and ſoul alſo, and therefore though the Statute be penal, yet it is not to be favourably interpreted, it being made for the peace and quiet of the Nation. The killing is the matter aimed at in the Statute, and it matters not whether the party be killed with a Faucheon or a Piſtol, as Williams caſe was, that killed another by throwing a Taylors Goſe at him, and he is not within the ſaving of the Statute though he was aſſaulted, and the other ſtood with the ſword in the ſcabbard in his hand, 36, 37 Eliz. Harper and Molins caſe in the Exchequer Chamber, The words of the Statute are, not being firſt ſtrook, but an aſſault is not a ſtriking, and ſo he is out of the Letter of the Statute, and here was no weapon drawn, for the ſword was in the ſcabbard, which is no more than a ſtaff in a mans hand, Stat. 5 E. 6. C. 4. and it is like to a Piſtol uncockt, and if the ſword had been drawn it would not have altered the caſe, becauſe it was not in Horwoods hand, who was ſlain, but in anothers, and you cannot extend the Statute further. Glyn chief Juſtice, Will you have it argued any more? Finch, No. Glyn chief Juſtice, I have conſidered of the Verdict, and conſulted with the Statute, and adviſed with all the Judges. and they are of mine opinion. This is a good Law, and to be interpreted ſtrictly, yet I hold the priſoner is not within it; for the ſcope of the Statute appears by the preamble, the body, and ſaving of it, which do all confirm my opinion: My firſt reaſon is, becauſe I find that the intent of the Statute is againſt ſudden killing, but here was not a ſudden killing, and the Statute takes not away the Clergy from all manner of Manſlaughter, and here was a Treſpaſs and an impriſonment acted

Intendments.

againſt

against the prisoner before he killed Horwood, and so the act was not suddenly done. 2ly. The body of the act seems to mean, that there ought to be malice in the case, and it doth not intend we should stick to the very words of it; and here the party slain might have forseen the danger, and defended himself. 3ly The proviso excepts divers particulars out of the Law, and the word killing is only in the proviso, so that there is provision made how the Statute shall be interpreted, viz. That it must be sudden killing, which is not so here, for there is provocations, and time intervenient betwixt them and the stabbing, and the Verdict finds no præconceived malice, and the Statute extends to no other killing by the proviso. And if one be assaulted by Theeves which have no sword drawn, and the party assaulted stabs one of the Theeves, he is not within the intent of the Statute, although he be within the words of it; or if one be assaulted in his house, and the Assaultor hath no weapon drawn, and one of the Assaultors be shot, yet the party assaulted is not within the Statute, 15 Car. in Davy and Williams case it was adjudged by all the Judges that he that killed another by throwing a Hammer at him was not within the Statute, because there was a preceding provocation of him. And if two assault a third person, and one of them strike the third person, and the third person kills the other that did not strike him, I do not conceive he is within the Statute, for it is the assault of both, and shall also be adjudged the striking of both. Ask Justice held he was within the Statute, because it was not unlawfull to come to arrest him, and here was no weapon drawn, and so it was adjourned to another day. At which day Buckner was again brought to the Bar, Ask Justice repeats the special verdict, & made the question whether this fact of Buckner be within the Statute of 1 Iac. enacted against stabbing, and he argued that it was, and that Buckner could not have his Clergy, because the Statute shall be taken beneficially for the Commonwealth, and not for the prisoner, who is a particular person, and the intent of the Statute is to take away the Clergy for some felony; Neither by the common Law, nor by the Law of God is there Clergy given for killing a man, and it was the Popish power that introduced the Clergy to be given for Manslaughter, and also for murther, in diminution of the Common Law, and of regal power, yea, and of the Law of God also. and if a woman kill one she shall not have her Clergy, but be hanged, which shews that by the Common Law the Clergy was not given for Manslaughter. And by the Law of God I find no difference betwéen Murther and Manslaughter, for it makes no difference betwéen hot blood and cold blood, as we do now distinguish; and every word in the Statute me thinks doth take away the Clergy by way of argument, even from the title of the Act to the very end of it, and here is a great sin to be punished, and great inconveniences would follow to admit of the Clergy in such cases as this is, and here was a sudden killing as the act expresseth, for it was done with a dagger which was not séen, but suddenly drawn out of a pocket, and no weapon was drawn against him, for the provocations alleged, they cannot amount to the drawing of a weapon, or such a provocation as the Statute intends, for all the acts done by Horwood amounted but to a Trespass, and cannot be such a provocation as should cause Buckner to fear his death, for no violence was used to his person by striking, or drawing of a weapon, or other ways, and the sending for Bailiffs to arrest him cannot be such a provocation as the Statute intends, which is to put the party in fear of his life, and the party knew that Horwood came with an intent only to arrest him, and not to kill him, nor did the party slain do any thing against Buckner to provoke him; and there is by presumption of Law a prepensed malice in Buckner to kill Horwood, which is séen by his sudden manner of stabbing him, and Davye

and Williams case urged on the other side is not like to this case. I grant if one kill a Thief suddenly it is not within the Statute, for such killing was never intended to be prevented by it. The worst words one man can give another are not a sufficient provocation within the Statute, for speaking of words doth much differ from drawing of a weapon: Nor is this a killing se defendendo, or by misfortune, but a killing at the Common Law, and so the Clergy is taken away by the Statute, and those of Serjeants Inne in Fleetstreet, amongst whom are Barkly and Foster, and Roll, who have been Judges, are of my opinion. Glyn chief Iustice held it not within the Statute, he argued long much to the effect as formerly, but having taken cold I could not distinctly hear him, Adjourned. This Case was again argued Trin. 1656. to enform Iustice Warburton who was called to that Bench, after the former arguments and opinion of the Court delivered much to the same manner as formerly, By Finch for the prisoner, and Baldwin for the Protector, and thereupon my Lord chief Iustice Glyn, and Iustice Warburton were of opinion against Iustice Ask, and so judgement was given for the prisoner, that the stabbing was not within the Statute, but was only felony at the Common Law, and the prisoner was admitted to his Clergy, and burnt in the hand accordingly.

VVilliamson and Coleman.

Mich. 1655. Banc. sup.

Iustification in Trespass.

VPon evidence given in an Action of Trespass between Williamson and Coleman at the Bar, It was said by Glyn chief Justice, that if one make a ditch, or raise up a bank to hinder my way to my Common, I may justifie the throwing of it down, and the filling of it up.

Mich. 1655.

Damages in Dower.

BY Glyn chief Iustice, If a Feme bring a writ of dower, and recover, and the Defendant die, the feme shall have her damages against the Terr-Tenants,

Mich. 1655.

Error quod coram vobis residet, what it is.

A Writ of Error quod coram vobis residet is when a writ of Error is brought to reverse a judgement given in the Common pleas, or other Court where the Record was formerly removed into the Court of the Upper Bench, and by reason of the death of the party, or for some other causes rests undetermined, by reason of the abatement of the former writ of Error.

Le-pool and Tryan:

Mich. 1655. Banc. sup.

For a prohibition to the admiralty.

VVIld moved for a prohibition to the Court of Admiralty to stay a tryal there in a Trover and Conversion, in which they proceeded upon a pretence that the goods in question were taken upon the High Sea, and that by the late Act they have exclusive power in all such cases, which is not so. Glyn chief Justice, It was resolved in Cremers and Cokelyes case so adjudged, that they have no such power, Therefore take a prohibition, nisi, &c.

Mor-

Morden and Hart.

Mich. 1655. Banc. sup.

MOrden brought an Action of debt upon an Obligation to stand to an Award against Hart. Upon nil debet pleaded, and a verdict for the Plaintif, it was moved in Arrest of judgement, and the exception taken was, that the Award was made but of one part, and so not binding to all the parties submitting. The case was this, One Stephens and Body on one part, and Hart on the other part submitted to stand to the Award. The Arbitrators awarded that Body should pay a certain sum of money unto Hart in satisfaction for the differences betwixt Body and Stephens on the one part, and Hart on the other part, which was objected could not be good, for the money paid by one could not be in satisfaction for another, and so the Award is not made to conclude all the parties submitting, for Stephens was not concerned in it, and the Award is with an Ita quod, which ought to be a general Award, and include all parties, and therefore if it be void in part it is void in all. But Green on the other side answered, though the Award should be naught in part, yet it may be good as to Body that paid the money, and the moneys ought to be received as they are paid, and that is for Body and Stephens, and may be well in satisfaction for both of them. It was also urged by Howell on the same side, that it appears that Body and Stephens are partners, and this will make an end of the matter, for then the money paid by one of them may satisfie for the other. Glyn chief Iustice, Here is a good Award betwéen two of the parties that submitted, but there appears nothing to be awarded as to Stephens, the third party, for it doth not appear that he can take any benefit by the Award of the money to be paid by Body, or that it can be any satisfaction for him, but only for Body. Iudgement for the Defendant, nisi. &c.

Arrest of judgement in debt upon an Obligation to stand to an Award.

Award in part.

Iudgement for the Defendant.

Busfield and Norden.

Mich. 1655. Banc. sup.

A Writ of Error was brought by Busfield against Nordon to reverse a judgement given in the Court Military of Ripon in an action upon an indebitatus assumpsit for wares sold, wherein there being a judgement given against the principal, a scire facias issued out against the Bail, and a judgement was thereupon had against him, the bail thereupon brings a writ of Error to reverse both these judgements, and assigns for Error, that there was no issue joyned in the first judgement, and that being erroneous, and being the ground upon which the scire facias did issue forth, whereupon the second judgement was given, the second judgement cannot be good. Glyn chief Iustice, But the principal judgement ought to be reversed by the principal, and not by the bail, and therefore the writ of Error is not well brought by the bail, therefore let it abate.

Error to reverse a judgement upon an indebitatus assumpsit by the Bail.

Bail cannot reverse the principal judgement.

The writ abated.

Mi-

Vidian and Fletcher.

Mich. 1655. Banc. sup.

Scire facias for an Infant to reverse a fine levied during Coverture.

VPon view of an Infant brought into Court to be inspected, who had during coverture joyned with her husband in levying a fine of her lands she was by the Court adjudged within age, whereupon a scire facias issued out to the Terr-tenants who came in and pleaded that she was of full age at the time of the fine levied, upon which plea issue was joyned, and a tryal was had at the Assizes, and a Verdict for the Plaintif, who now came in Court and prayed for judgement upon the Verdict. Glyn chief Iustice: The Court is to judge of the Infancy, and not the Jury, and therefore you have not proceeded duly, but the proceedings do no hurt, for we judge she was within age, Therefore let the fine be reversed, nisi, &c. Nota.

Jury not to try Infancy.

Fine reversed.

and the hundred of Crondon.

Mich. 1655. Banc. sup.

Arrest of judgement in an Action upon the Statute of Hue and Cry.

AN Action of Trespass upon the case was brought against the Hundred of Crondon in Hampshire upon the Stat. of Winchester, by one that was robbed within the hundred, upon the tryal a verdict passed for the Plaintif, It was moved on the behalf of the Hundred *in* Arrest of judgement, 1. That the Plaintif had mistaken his Action, for whereas he hath brought a general Action of Trespass upon the case, he ought to have brought an Action upon the Statute. 2ly. He declares that he took his Oath before I. S. a Justice of Peace in the County, whereas it should be for the County. 3ly. He hath not expressed that he took his Oath before a Justice assigned to keep the Peace. 4ly, There is no issue joyned. 5ly. He saith that he took his Oath 20 days, but doth not say next before, as the Statute directs. Windham on the other side answered to the first Exception, that it is usual of latter times to declare in an Action upon the Case generally. To the second he said it is no exception, for a Justice of Peace is not an Officer affixed to a place. Serjeant Twisden, But it doth not appear that you took your Oath 20 days before your Original sued out. Glyn chief Iustice, That appears well enough upon the Record. But the writ here *is in an* Action upon the case generally, & yet he declares in an Action upon the case upon the Statute, which is not all one, and so the Declaration varies from the writ, for an Action upon the Case upon the Statute is an extraordinary Action upon the case, but I believe it is well enough, notwithstanding, it being after a Verdict, and not being a material variance, but a bare recital, Therefore let the Plaintif take his judgement.

Stat. Case.

Variation.

Recital judgement.

Conye and Lawes.

Mich. 1655. Banc. sup.

Hill. 1655. rot. 251.

Error to reverse a judgement in an Action upon a promise

LAwes brought an Action upon the case against Conye upon an indebitatus assumpsit upon an accompt, the Defendant pleaded non assumpsit, and

and upon issue joyned, a special verdict was found for the Plaintif, and a judgement given for him, upon the special verdict the case appeared to be this, the Plaintif Laws maried a Feme unto whom monies were owing dum sola fuit, and the Baron, and the Debtor come to an accompt for the mony, the Debtor being found in arrere promiseth the Baron to pay him the mony due upon the accompt at a certain day, & for not performing this promise the Plaintif brought his Action. Upon the writ of error brought it was urged, that the Plaintif did not shew how the monies became due to the wife, and that the accompt did not alter the Case, and Herndon and Palmers case, Hob. 88. was cited to be like this case, and Done and Thorns case, 24 Car. in this Court was also cited, and 20 H. 6. f. 20. b. Wild on the other side said, that the Declaration is true, and the verdict contradicts it not, for by the mariage the debt is due to the Husband, and therefore he ought to bring the Action, and the case differs from Hobarts case. Glyn chief Iustice, Hobarts case is not like this, it is true the accompt alters not the nature of the Action, but here the verdict finds that there was a special promise made to pay the monies to the Husband, and there may be an actual promise in an insimul computaverunt, although the law doth create a promise where a special promise is not shewed, and here is a distinct day for payment of the mony alleged, and the consideration is good, for it is a debt due to the Husband, and he may release it, and the doubt made by the Jury is, whether the Action be well brought by the Husband alone or not. At another day Green urged, that here doth not appear a consideration for the special promise, and then it can be taken but for a promise in Law, and upon such a promise the Action cannot lye, for the debt is due to the wife notwithstanding the mariage. Wild answered, the accompt is good to the Baron to ground the promise upon, and he cited Partridges Case, and the promise here to pay the mony at a day is a special promise and not created by the Law, and this makes the consideration good, and the Declaration is true, for it is the Husbands debt, and the verdict confirms it, and if the wife dy the administration belongs to the Husband, which proves it is his debt, and the writ of error is not good, and so the Record is not removed, the writ of error is directed to the Maior and Sheriffs of Lincoln, and the Court is said to be held before the Sheriffs only. Glyn chief Iustice, The nature of the debt is not changed by the accompt, no more than the accompting with an Executor, but a special promise may alter the debt: Here is a promise made to the Husband, and he hath brought the Action as if the Defendant were indebted to him, yet he is not indebted to him generally, but sub modo, viz. jure uxoris. There is another point in the Case, I conceive here is cause of Action, but whether it be applicable to make it a special debt is the question. But the writ of error is naught, therefore let it be quashed.

Special promise.

Consideration Release.

Promise in law.

Debt changed.

Writ of Error quashed.

Arnold and Floyd.

Mich. 1655. Banc. sup.

ARnold a Brver brought an Action of Debt upon a Bond to perform Articles against Floyd his Clark. The effect of one of the Articles was, that the Defendant should deliver weekly such Ale and Beer as should be delivered unto him to such Customers as he had in his charge, & receive the monies of such Customers as were due for the same, and the excise, and should accompt every Saturday weekly unto the Plaintif for such monies as he should receive for the same, for breach of Covenant the Plaintif

Arrest of judgement in debt upon an Obligation to perform articles.

assigns that the Defendant did not accompt with him for such monies as he had received upon Saturday the 26th. of July 1654. and for this he brings his Action. Upon issue joyned, and a verdict found for the Plaintif, it was moved in arrest of judgement, that the breach was uncertainly alleged, because the Plaintif doth not shew, that the Defendant had any Customers in his charge, or who they were, or that he had delivered Ale or Beer to them, or received any mony of them Glyn chief Justice, The charge is too generally set forth, for you ought to have shewed what monies he hath received, and that it was of those Customers in his charge, for the Plaintif may have several Clarks, and some Customers may be in the charge of one Clark, and some in the charge of an other, so that the charge is not certain. Therefore let Nil capiat per billam be entred for the Defendant.

Uncertain charges.

Judgement Nil capiat per billam.

Tost and Day.

Mich. 1655. Upper Bench.

Error to reverse a judgment upon a Action upon the Case for making a false return of a Writ.

An Action of Debt was brought in the Common-pleas, and a judgement given for the Plaintif, who thereupon takes out execution, viz. a Fieri facias, and delivers it to the Sheriffs of Norwitch, who executed it by levying the debt upon the goods and chattels of the Defendant, after which the Sheriffs were discharged their Office, and new Sheriffs elected in their places. Whereupon the old Sheriffs redelivered to the party the goods taken in execution, by vertue of the Fieri facias, and endorsed nulla bona upon the writ of Fieri facias, and delivered it so endorsed unto the new Sheriffs, and for making of this return an Action upon the Case was brought in the Common pleas against the two old Sheriffs, and a judgement obtained against them; whereupon a writ of error was here brought to reverse this judgement, and these exceptions were taken, 1. That the Plaintif in his Declaration in his Action upon the Case doth not say, that the old Sheriffs did return nulla bona, but only that they did endorse nulla bona upon the writ, which is not a return, and so the Action cannot lye for a false return. 2ly. He sayes that the old Sheriffs delivered the writ thus endorsed to the new, but doth not say that they did deliver it to be returned, viz. by Indenture, as the use is. 3ly. It doth not appear whether there were any return of the writ made either by the old Sheriffs or the new. 4ly. The Action is brought in a wrong County, for it is not brought in the County where the endorsement and delivery over of the writ was Latch of councel on the other side answered, that the Action was brought for delivering the goods back again to the Defendant after they had taken them by vertue of a Fieri facias, and not for the endorsement made upon the writ. The rule was to reverse the judgement, except cause shewed to the contrary. At another day the Court was moved to affirm the judgement, and the councel on the other side insisted upon the former exceptions to reverse the judgement. Glyn chief Justice caused the Record to be read, and upon Oyer thereof said, I conceive it is well, and according to the course in that kind; for the old Sheriffs to make the return, and to deliver the writ over by Indenture to the new Sheriffs, and here is also a verdict in the Case, and a return is not properly a return until it be filed here, yet it is the return of the Sheriff in the County where he is Sheriff. Shew cause upon notice why the judgement ought not to be reversed. Antea. Q.

Return.

Indenture.

Venue.

Den-

Denton.

Mich. 1655. Banc. sup.

An order of the publique Sessions made against one Denton for the keeping of a Bastard-child was removed into this Court by a Certiorari, and the party also who was committed to Ailsbury-gaol for disobeying the order, was brought into Court upon a Habeas Corpus granted unto him, and upon the reading of the return of the Habeas Corpus, this exception was taken to the return, that it appears by the return that the order made for Denton to kéep the Bastard-child was made by the Justices at the Quarter Sessions, and that for not obeying this order he was committed to the Gaol by two Justices at a private Sessions of the peace, whereas the Justices of the Quarter Sessions had no authority by the Statute to make such an order, for it ought to have bén made by the next two Justices of peace to the place where the Bastard was born. And to this Glyn chief Iustice agréd, but would not release the Prisoner till he was bound over with good bayl to the next Quarter Sessions for the County of Buckingham, to appear there and to answer the fact.

To quash a return of an order of Sessions.

Att Lee and the Lady Baltinglas.

Mich. 1655. Banc. sup.

The Court was moved on the Defendants behalf, that there was an Action upon the Case brought against Baron and Feme, and the Feme had appeared, but the Baron would not, and that the Plaintiffs Attorney stood to have special bayl for her, which she could not procure, and therefore it was prayed, that she might be delivered upon common bayl. But Glyn chief Iustice answered, if there be cause to have special bayl the wife must lye in Prison, untill the Husband appear and put in bayl for her, for she cannot put in bayl for herself being Covert Baron.

To discharge a feme covert upon common bayl.

Denied.

Elmes and Martyn.

Mich. 1655. Banc. sup.

The Court was moved, for the Plaintif that in respect that the Defendant had put in a special plea, and pleaded a very long Award, which made the plea very long, that therefore he might have time granted unto him by the Court to demur to this plea. But Glyn chief Iustice answered, you need not have time to demur to the Plea, for you may do that presently: but if you desire time to rejoyn in respect of the length of the Plea, you shall have it.

For time to demur to a plea.

Denied.

Rejoynder.

Plummer and Sir Iohn Lenthall.

Mich. 1655. Banc. sup.

The Plaintif shewed to the Court by his Counsel that he had brought an Action of escape against Sir Iohn Lenthall the Mareschall of the Marshalsea of this Court, and had thereupon a judgement and an execuți-

To put Sir Iohn Lenthall out of his Office.

on 'against him, but that Sir John though as being Marshall he ought as an Officer of this Court daily to attend the Court, did yet nevertheless absent himself, so that the Plaintif could not take him upon the execution, and that if he were present he doubted, whether he might take him, for fear it would be an escape of the Prisoners committed to him, and therefore prayed that Sir John Lenthall might be put out of his place of Marescall, that so he might take him in execution. Glyn chief Iustice, This is very mischievous, let Sir John shew cause Friday next why he should not pay the monies.

Cause.

Le Gross and Hall.

Mich. 1655. Banc. sup.

To reverse a judgment for expedition.

IN a writ of Error brought in this Court to reverse a judgement given in an Action of debt The Defendants Councel in the writ of Error moved, that the Court would reverse the judgement because they conceived it was erroneous, for their own expedition, that they might bring a new Action. Glyn chief Iustice, You have not yet confessed the error upon the Record, neither have you pleaded in nullo est erratum, as you ought to do, and therefore you move too soon to have the Iudgement reversed.

Denied for moving too soon.

Hamond and Thornhill.

Mich. 1655. Banc. sup.

Whether Gavelkind-lands held by chivalry be deviseable.

IN the Case of one Hamond and Thornhill in a trespass and ejectment tryed at the Bar, upon the evidence given it was affirmed by Sergeant Twisden, that Gavelkind-lands though they be held by Knight-service tenure, might be all devised by Will by the custom of Kent. Q. for other Councel doubted of it.

Arnold and Floyd.

Mich. 1655. Banc. sup.

THis Case formerly spoken unto, and after a Nil capiat per billam, nisi, &c. ordered to be entred against the Plaintif was again spoken unto, and the Case put, and the exception formerly taken that the Plaintif had declared of a general receiving of mony of such and such Customers, and had not accompted for them, whereas the Articles for breach of which the Action is brought do express that he should accompt for such monies as he should receive of the Customers, which were in his charge only. But Green answered, that though it was not so expressed, yet it should be intended that he had not accompted for all such monies as he had received of the Customers in his charge. and as to another exception which was also formerly taken, viz. that the Plaintif had not shewed what monies he had received, for which the Defendant had not accompted, and so he knew not what answer to give, Green answered, that the Plaintif is not bound to shew it precisely, for he cannot tell what the Defendant had received, and what not, but the Defendant doth know it well enough. Glyn chief Iustice, I doubt of that, for the Plaintif must know that the Defendant hath received some monies

nies which he hath not accompted for, otherwise there is no cause of Action, and though it be not necessary for you to shew all the particular sums the Defendant hath received and not accompted for, yet you must express some sum with which to charge him withall, and therefore as to this exception, I think it material, and the Declaration is too general to charge the Defendant by, for what issue can be joyned upon this? for here doth not appear to be any breach of the Articles, but only by implication that he hath received some monies unaccounted for, and an issue cannot be tryed upon a presumption. Green praied leave to discontinue the Action. But Wild on the other side said it ought not to be, because the Action is brought against a Surety only that was bound for the Defendant that he should perform Articles. Glyn chief Iustice, If he do discontinue the Action, he hath no further remedy against the Defendant. But shew cause why he should not appear upon the Articles, and to pay so much as it shall be found that he is dampnified by breach of them, and then he shall discontinue.

Issue. Presumption.

Discontinuance.

Devereux and Jackson.

Mich. 1655. Banc. sup.

Hill. 1654. rot. 835.

A Writ of Error was brought to reverse a judgement given in an Action of Debt, and the exception taken was, that the Plaintiff had brought his Action for 14 l. and he declares of a Debt due to him for wares sold by him unto the Defendant, which by his own shewing come but to twelve pound. Glyn chief Iustice, I conceive it is not good for the variance, and therefore let the Iudgement be reversed, nisi, &c.

Error to reverse a judgement in debt.

Variance. Reversed.

Pooly and Markham.

Mich 1655. Banc. sup.

The Court was moved that the Secondary might return a Jury upon Affidavit that the Plaintiff in a former tryal between the parties had feasted four of the Jury, and had also feasted some of the Jury that are returned upon this tryal. Glyn chief Iustice, Let the Freeholders book be brought to the Secondary, and let him return a Jury.

For the Secondary to return a Jury.

Granted.

The Protector and the Town of Kingston upon Thames.

Yates his Case and others.

Mich. 1655. Banc. sup.

Yates and four or five other persons, Freemen of the Town of Kingston upon Thames, being disfranchised by the Baylifs, &c. of that Corporation, moved for a writ of restitution to be restored to their freedoms and places in that Town, and had it granted, which writ was accordingly directed to the Bailifs, &c. of that Corporation, who thereupon do make return of the writ,

Upon the return of a writ of Restitution to Freemens places in Kingston upon Thames.

writ, and therein set forth at large there Charter and privileges of the Town, and the cause of the disfranchisement of Yates and the others, and reasons why they were not to be restored. And by the return the matter of fact for which they were disfranchised appeared to be in substance this, viz. that there was a difference amongst those of the Corporation about making an Attorny of their Court, at a Court held for the Town, that there was like to be a tumult and uproar about this matter; whereupon the Baylifs that held the Court did adjourn the Court, and commanded all persons there to depart, and then they with the rest that were of their party went away. But the other parties on the contrary side, whereof Yates and the rest that were disfranchised were a part stayed still in the Town-Hall, and said, the Court was not dissolved, and did affirm they were a Court, and did therupon make divers orders or acts of Court, and caused them to be entred in the Court-book where all the orders used to be entred To this return many exceptions were taken, and first by Sergeant Twisden, 1. That here was no sufficient matter of fact returned to be done by Yates and the others, to cause them to be disfranchised. 2ly. That the return did not shew, that the Customs of their Corporation did warrant them to disfranchise any for such offences, or did shew that any person had at any time been disfranchised for such offences, 3ly. The return mentions that the persons disfranchised had broken their oaths as Freemen of the Town, but doth not set forth this oath at large as it ought to be. 4ly. They do not shew in the return that they had any authority to hold that Court which they dissolved, nor before whom it was held. 5ly. It is not shewed in the return that Yates and the others were at all convented to answer their offences, and so they are condemned without hearing of them, which is illegal. To these exceptions Green of Councel to maintain the return made this answer, for the first he said, there doth appear a sufficient fact to be done by Yates and the rest to cause them to be disfranchised, viz. their tumultuous going into the Court, and staying there after it was dissolved, and making of orders, and entring them into the Book, and cited Sir James Bags case, that this their fact was a corrupting the orders of the Town. For the second the return doth sufficiently express, that by their Customs they may remove persons from their places in the Corporation for such offences, Removeable. for the return saith, that persons have been from time to time removeable, which is all one as if it had said, they have been removed. 3ly. It is not necessary to set forth the whole oath of a Freeman, and here is as much of the oath mentioned as is needfull to shew that the oath was broken by them. 4ly. It is shewed in the return, that the Court was held according to their Customes, and so it shall be intended to be a good Court, and rightly held, and it needs not to be expressed before whom it was held. 5ly. It is expressed that they were convented, and that they had also notice of the dissolution of the Court. Mr. Attorney General on the same side said, Here is cause to disfranchise the parties; for here appears by their fact to be Oppositon of Government. a setting up of government against government, and this is corrupting of government, and done by knowing persons that well understand the Customs of the Town, which makes their crimes the greater, and it is better returned, that such persons are removeable, than to say they have been removed, and here is more than an opinion of one of the parties against the opinon of the others, for they have reduced their opinion into an Act to disturb the government. Mr. Recorder of London on the same side said, that here is a fact done to eradicate the whole government of the Town, for doing whereof the parties justly deserve to be disfranchised, and their entring of orders into the Register-book is a corrupting of the Customs of the Town, and tends to the subversion of the Corporation, and he cited 28 H. 8. Maleverers

verers case in Dyer. Alleyn on the same side, Here is sufficient cause shewed in the return to turn the parties out of their offices, unto which they pray to be restored if there should not appear sufficient matter to disfranchise them. Roll who when this case was first moved was chief Justice, said, here is one Groves that prays to be restored, concerning whom the return shews no cause at all why he was removed, but only that he was endicted of Felony, which is not a sufficient cause, for he may be endicted falsely, and it doth not appear that any thing hath been as yet done upon the Endictment, and yet they allege this for cause why they will not restore him, and if you have no cause to remove him, then he is unjustly removed, and ought to be restored, and this cause you have shewed, such as it is, was after that he was removed, and so could be no cause of his removal. But for the rest there is no question but that here is a high contempt, and just cause to disfranchise the parties, for here is more than an opinion, as hath been urged for them, for there is an Act of a high nature tending to evert all government in hindring the proceedings of Justice, and the profit and welfare of the Town, and a greater offence of this nature cannot be imagined, and therefore for the matter there is cause to disfranchise them. But the question is, whether the return be good, and as to that I conceive it not necessary to set forth the whole Oath, or to aver the swearing of the Attorney. But the return ought to have been, that by their Custome they have used to remove persons for such offences, and not to say they are removeable, and of this I doubt and will advise. At another day Latch of Counsel for Yates urged that the return was not good, for they have not shewn any Act done to remove any person for misdemeanors, according to the custom, as they have alleged it; for the return says only that such parties have been removable, and this is only a possibility of an act, and it appears not how they are removable, either by their Custom, or by their Charter, and consequently here is no ground for their removal returned, Pasch. 33 Eliz. C. B. a potential Custom returned is not good, possit & potuisset adjudged not good in Sir William Hattons case, and 21 Iac. usus fuit held naught. And as to the Objection that it is not necessary to return their power to remove, because it is a thing incident unto their Corporation, I answer they have returned a power, but have not made it good by the return. Mag Chart. 25. and to the Objection that a return needeth not to be so formal as a pleading, and that therefore if their power do appear upon the whole return it is good enough, I answer, that they have failed in the very matter of their prescription, and not in the form only, and they must certifie a good cause of their removal, that the Court may judge of it; and as to that which is objected, that their Charter is a very antient Charter, and therefore cannot be pleaded, I answer, that they may give it in evidence, and also a Charter made time out of mind may be pleaded as an old deed may, although you cannot plead that it was made time out of mind. Serjeant Twisden on the same side, All customs ought to be alleged in facto, 9 Car. Fletcher and Bagnals case, Licitum fuit for a Londoner to use any trade by the custom of London adjudged to be ill pleaded, and though it may be good in an evidence, yet it is not good in a return. Alleyn on the other side said, that the return is good in the returning of the custom, though it would have been ill in the pleading, which is stricter than a return need to be, and here is matter enough returned to remove the parties, and the whole customs need not to be returned, and the informality of the return shall not make it ill, for this Court is to judge of the matter of fact returned, and so is Giles Bags and Wagoners case, and they have returned a custom to remove, and by consequence some have been removed, or else the return is false, which is not to be presumed. Windham,

No cause of disfranchisement.

Have used to remove.

Possibility of an Act.

Potential custome not good.

Charter pleaded and not given in evidence.

Pleading.

Return.

ham, Every custom is presumed by the Law to have a lawfull beginning, and shall be intended many times to be by antient Charter, namely, for such things as are not to be claimed without a Charter, but if they may be claimed without a Charter it shall be intended otherwise. An antient Charter doth not lose its force by not being confirmed in Eyre, as Latch hath said, 24 H. 6. and there may be a prescription for things which have never been acted, if it began by Charter, 22 E. 4. f. 9. Green on the same side The very words of the return do enforce that persons have been removed. Glyn chief Iustice, I have no books delivered me in this case; And this Exception was moved the last Term, and it is very doubtfull to me, and my Lord Roll would not deliver his opinion, I could wish the business might be composed for the peace of the Corporation. To say that the lands have been demised and demisable, the words shall be taken distributive. But me seems here is no matter of fact returned for removing of any. At another day the case was spoken to again, and against the return it was excepted as formerly, that the Town had not by the return intitled themselves to any power to remove the parties, for here is a prescription only in fieri and not in facto returned, viz. That such persons have been accustomed to be removable, and it doth not say they have been removed, and these cases, viz, 20 E. 4. and Mich. 7 Car. Flowers case, and Mich. 9 Car. Fletcher and Bagshaws case, and Skipwiths case, 25 Eliz. C. B. were cited by Wild on Councel for Yates. Windham on the other side as formerly distinguished betwixt a pleading, and a return, which needs not be so formal as a pleading, but shall be taken good to a common intent, and said that Wagoners case, which was as this is, was adjudged to be well upon good advice, and the substance of the prescription is well set forth in the return, and the formality is not to be much stood upon, or regarded. Heyn on the same side said, that the rule in Wagoners case comes home to this. Glyn chief Iustice, There is an Action upon the case brought by Yates for this matter, and if it be found for him we will restore him, be the return as it will. Custom is the main hinge upon which all disfranchisements do move, and if that be not well alleged, it will be hard for the disfranchisement. Try your cause this Term, otherwise we will deliver our opinions upon the return. At another day the Court was moved for their opinion upon the return, by Yates his Councel, whether it was good or not. Wherupon Glyn chief Iust. answered, It were good you would agree as the Court hath advised; But since you will not we will give our judgement, for the cause hath depended long. And first I conceive that here is good cause to disfranchise the parties for entring of orders made by a pretended Court, which in truth was no Court, for their entry of such orders is very prejudicial to the corporation, and is to the ill example of others, to disturb the government. But Custom is the main cause of disfranchising any person, for by the disfranchisement the party loses his freehold, which is no small loss, and therefore not to be put in practice but upon very good warrant; yet in some cases for the advancement of government one may be put out of his freehold without a legal proceeding against the party, as Sir Iames Bags case is. But there must be a Custom or a Statute to warrant it. But here appears no such Custom upon the return, for the return is that for such offences the parties have used to be removable and dischargeable, which is meerly imaginary, and a thing in fieri, and not in facto, or in usage, and so it is as a dead thing in the womb which never had birth, for you have not shewed that it was at any time put in practice; or have made any direct affirmance of the Custom, as all Customs use to be pleaded. All Customs imply two things, to wit, a thing possible to be done, and that the thing hath sometimes been done, and so are all our pleadings, and the return ought to have

Antient Charter.

Prescription in fieri.

Substance.

Cause of disfranchisement.

Thing in fieri not in facto.

Possibility and use.

have in it certainty enough to inform the Court of the matter returned, although it is not required they should be so precise as pleadings ought to be, for both the Court and the party must abide by the return, and it is to be acknowledged as true. In Wagoners case cited, It was touched whether the Custom there was well alleged, and concerning the Customs of London also, which do differ from other customs, they being confirmed by Statute, and there they allege a special act of Common Councel by Custom, and a Statute also to enable them to do as they did. I have considered well of the return, and I hold the return to be naught, and therefore let him be restored. Ask Justice concurred in opinion. The Court was moved to restore the rest, who were 4 in number, because all their cases were alike. Glyn chief Justice, Let them be restored also, nisi, &c.

Return should be certain.

Ill return.

Restored.

London and Craven,

Trin. 1655.

Rot. 44.

LOndon and Craven entred into Articles by Indenture betwixt them, wherein London did article to pay 110 l. at a certain day to come unto Craven, & Craven did article that upon the receipt of the 110 l. unto him from London, that he would give unto London an acquittance for the 110 l. and would also enter into an Obligation of 400 l. unto London to save him harmless from all claims which should be made unto certain lands in the possession of the said London, in pursuance of these Articles London doth tender the 110 l. unto Craven at the day limited in the Articles, but Craven refuseth to receive the 110 l. of London, and to give him an acquittance, and also to enter into the bond of 400 l. Whereupon London brings an Action of Covenant against Craven for breach of the Articles, and assigns the breach to be, that he did not give him an acquittance for the 110 l. nor enter into the bond of 400 l. according to the Articles, and upon issue joyned a verdict was found for the Plaintif. It was moved by the Defendant in Arrest of Judgement, That here is no breach of Covenant shewed by the Plaintif, for the Declaration is that the Defendant upon the payment of the 110 l. was to give the acquittance, and enter into the bond of 400 l. and here is no payment, but only a tender and a refusal of the 110 l. mentioned, and it was in the Defendants election, either to refuse the 110 l. and to give no acquittance, nor enter into the bond of 400 l. or else to receive it, and give the acquittance, and enter into the bond, and so his refusal is no breach of Covenant. On the other side it was urged that it was not in the Defendants Election to receive the 110 l. or to refuse it, but he was bound by the Articles to receive the 110 l. and to give the acquittance, and enter into the bond of 400 l. Glyn chief Justice, Here is a Covenant grounded upon Articles indented, and it is the mutual Covenant of both the parties, so that he is bound by the Articles to receive the 110 l. at the day limited, & it is not in his power either to receive it, or to refuse it, as hath been objected, & the Defendant had remedy by the Articles to recover the 110 l. if it had not been payed at the day, and therefore he is bound to receive it, and to give an acquittance for it, and to enter into the bond of 400 l. and we must make a reasonable construction of the words of the parties, But we will advise. At another day the case was again put, and the opinion of the Court desired, And Glyn chief Justice thereupon said, here is no breach of Covenant alleged to ground the Action upon, for the Articles express, that upon the re-

Arrest of judgement in an Action of Covenant for breach of Articles

Mutual Covenant.

reipt of the 110 l. the Defendant would give the acquittance, and enter into bond, and the breach alleged is, that the Plaintif tendred the 110 l. at the day, and the Defendant refused to receive it, and hath not sealed the acquittance, nor given the bond of 400 l. and it may be it was the intent of the parties, that it should be in the election of the Defendant either to receive the 110 l. or not to receive it, and the Plaintif is not prejudiced by the Defendants not receiving of it; for if he should sue for the 110 l. the Plaintif may plead this tender and refusal against him, and that will be judged a payment, and when he sues you for the 110 l. you may sue him for the acquittance and the bond. Ask, I have not a book, but I think the case is as it hath been put, and here is no Covenant that the Defendant should receive the 110 l. at the day, Glyn chief Justice, Nil capiat per Billam, nisi, &c.

Nil capiat per Billam.

Clark and Fitzwilliams.

Arrest of Judgement in a Trover and Coversion.

AN Action of Trover and Conversion was brought by Clark against Fitzwilliams for divers goods and houshold-stuff, and amongst the rest the Plaintif declared of a Trover and Coversion of 6 Tuns. After a Verdict for the Plaintif it was moved in Arrest of Judgement, that the Declaration was uncertain, for it cannot be known what is meant by 6 Tuns, and upon this the judgement was staied till the Plaintif should move. Whereupon Serjeant Twisden at another day moved for judgement, and said the Declaration was good enough, for it is known that the 6 Tuns are Brewers Vessels, or else they signifie nothing, and then no damages are given for them, according to Osborns case, and the case where the Action was pro viginti ulnis instead of ulnis. Windham on the other side said, that a Tun is a measure, and well known so to be, and you ought to shew certainly of what you doe demand the quantity of six Tuns, and it cannot be said that the six Tuns shall signifie nothing, as Serjeant Twisden supposeth, for here the words are substantive, and signifie by themselves, and not adjective, and Osborns case cited was adjudged upon another reason; for fulcrum lecti signifies a Bedstead, and the Anglice which was added, viz. Curtains and Valence were a meer addition, and no part of the Declaration, and besides they were in English which ought not to have been. Glyn chief Justice, The Court hath delivered their opinion already, That it is incertain what the Plaintif doth mean by the words 6 Tuns, for this case is not like the cases put, where a thing is mentioned, which doth signifie nothing, for there damages cannot be given for such a thing, for the word Tun doth signifie divers things, but it is incertain what it doth signifie here, and therefore Nil capiat per billam, Ask Justice ad idem.

Nil capiat nisi.

Fox and Swann.

Mich. 1655. Banc. sup.

Exception against a witnesse.

IN a Tryal at the Bar in a Trespass and Ejectment betwixt Fox Plaintif and Swann Defendant exception was taken against a witness that was produced to prove the lease of ejectment, because he had the inheritance in the lands let, but it was urged by the Counsel on the Plaintifs side, that the Defendant did claim under the same person that the Plaintif did, and thereupon

thereupon the witnes was admitted to be sworn, and in this case it was also said that if Lesee for years do covenant with the Lessor not to assign over his Term without the Lessors consent in writing, and do afterwards without such consent devise the Term to J. S. this is not a breach of the Covenant, for a devise is not a lease. It was also said, that if a lease for years be forfeited, and the rent for the land let be afterwards received by the Lessor or by his assent, the lease is made good again by this Act of the Lessee for, and the forfeiture is dispensed withall. Nota.

A Devise is not an assignment.

Lease forfeited revived.

Mich. 1655. Banc. sup.

UPon Articles exhibited in this Court against one Alwin an Attorney of this Court for false practice and Barratry, and proved against him by divers Affidavits read in Court, Judgement was pronounced against him by the Court, that he should be put out of the Roll of the Attorneys, and be fined 50 l. and turned over the Bar, and stand committed. He was turned over the Bar accordingly at the West end of the Bar by the Tip-staffs of the Court.

Attorney convicted upon Articles, turned over the Bar.

Martyn and *Miller*.

Mich. 1655. Banc. sup.

THere were two several causes tryed betwixt Martyn Plaintif, and Miller Defendant, and thereupon there were two venires, and two Distringasses taken out, and by the mistake of the Sheriff a wrong Distringas was filed to the Venire, viz. that which should have been filed to the Venire in the first cause, was filed to the Venire in the second cause, and this was moved in Arrest of Judgement. Glyn chief Iustice, This is as if there was no Distringas, and is therefore helped by the Statutes of Jeofails, but if it were an erronious Distringas it could not be helped, and here was a good issue joyned, and a good tryal of that issue, and it was but the mistake of the Sheriff, and may be amended by taking off the wrong Distringas from the Venire, and firing the right Distringas in the room of it, and therefore this is no cause to arrest judgement.

Arrest of judgement upon an Error of a Clark.

No Rule.

FINIS.

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To

To the Reader.

BE pleased to take notice that notwithstanding my more than ordinary care in Correcting the Presse, these ensuing Errataes have happened in the Printing, but many of them are but literal, and alter not the sense, and for the others I hope you will pardon them, and correct them by the Errata as you meet with them.

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